Volume 142 Fall 1993

DEP'T OF ARMY PAMPHLET 27-100-142

MILITARY LAW REVIEW

ARTICLES

Charlottesville, Virginia

MILITARY LAW REVIEW

VOLUME 142 • 1993

Pamphlet

No. 27-100-142

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, D.C., *Fall* 1993

MILITARY LAW REVIEW–VOL. 142

The ***Military Law Review*** has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The Review provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The ***Review*** encourages frank discussion of relevant legislative, administrative, and judicial developments.

SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of such periodicals should address inquiries to the Editor of the ***Review.***

Inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies should be addressed to the Editor of the ***Review.*** Judge advocates of other military services should request distribution from their publication channels.

CITATION: This issue of the ***Review*** may be cited as 142 MIL. L. REV. (number of page) (1993). Each quarterly issue is a complete, separately numbered volume.

POSTAL INFORMATION: The ***Military Law Review*** (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Second-class postage paid at Charlottesville, Virginia and additional mailing

offices. POSTMASTER: Send address changes to *Military Law* ***Review,*** The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaced the volume indices in volumes 82 through 90. Volume indices appear in volumes 92 through 95, and were replaced by a cumulative index in volume 96. **A** cumulative index for volumes 97-101 appears in volume 101, and a cumulative index for volumes 102-111 appears in volume 111. Volume 121 contains a cumulative index for volumes 112-121. Volume 131 contains a cumulative index for volumes 122-131. Volume 141 contains a cumulative index for volumes 132-141.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.); Index to Legal Periodicals; Monthly Catalogue of United States Government Publications; Index to U.S. Government Periodicals; Legal Resources Index;* three computerized data bases, the *Public Affairs Information Service, The Social Science Citation Index,* and *LEXIS*; and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current U.S. Government Periodicals on Microfiche,* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

MILITARY LAW REVIEW

Volume 142 **Fall 1993**

CONTENTS

ARTICLES

SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Authors also should submit a 5 ¼ inch or 3 ½ inch computer diskette containing their articles in IBM compatible format.

Footnotes should be coded as footnotes, typed double-spaced, and numbered consecutively from the beginning to the end of a writing, not chapter by chapter. Citations should conform to ***The Bluebook, A Uniform System of Citation*** (15th ed. 1991), copyrighted by the *Columbia, Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to *Military Citation* (TJAGSA 5th ed. 1992) (available through the Defense Technical Information Center, ordering number AD A254610). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of grade or other title, present and immediate past positions or duty assignments, all degrees, with names of granting schools and years received, bar admissions, and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

EDITORIAL REVIEW: The Editorial Board of the *Military Law Review* consists of the Deputy Commandant of The Judge Advocate General's School; the Director, Developments, Doctrine, and Literature Department; and the Editor of the *Review*. They are assisted by instructors from the teaching divisions of the School's Academic Department. The Board submits its recommendations to the Commandant, TJAGSA, who has final approval authority for writings published in the *Review*. The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.

The Board will evaluate all material submitted for publication. In determining whether to publish an article, note, or book review, the Board will consider the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. There is no minimum or maximum length requirement.

When a writing is accepted for publication, a copy of the edited manuscript generally will be provided to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, page proofs are not provided to authors.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies are usually available in limited quantities. They may be requested from the Editor of the *Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Editor of the *Review*.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review*, The Judge Advocate General's School. U.S. Arms, Charlottesville, Virginia 22963-1781.

MILITARY LAW REVIEW

Volume 142 **Fall 1994**

ABOLITION OF COURT MEMBER SENTENCING IN THE MILITARY

MAJOR JAMES KEVIN LOVEJOY*

I. Introduction.

The court-martial panel has convicted the accused of an offense. Counsel for the government and for the accused present evidence in aggravation and extenuation and mitigation, respectively. The military judge provides the members with sentencing instructions and the court closes for deliberation on an appropriate sentence for the accused. The members enter the deliberation room and the following colloquy occurs:

PRESIDENT "Alright, before we vote on a sentence, does anyone have anything they want to discuss?"

MEMBER **1:** "I do. We all know the accused was lying through his teeth on the merits. I think we ought to sentence him to the maximum punishment."

MEMBER **2:** "We've heard this story before about how he came from a broken home and was abused by his father. Let's not make the same mistake we did last time when we didn't give the accused a Dishonorable Discharge.''

MEMBER **3:** "I'm confused. We heard a lot of testimony about the accused's lack of rehabilitative potential. Just what exactly does that mean? Because he doesn't have any should we give him a longer sentence or just discharge him?"

MEMBER **4: "I** don't know, I can't help but think that 'but for

*Judge Advocate General's Corps, United States Army. Presently assigned **as** Chief, Military Justice and Operational Law, Office of the Staff Judge Advocate, 3d Infantry Division (Mechanized). B.S. 1981, University of Notre Dame; J.D., 1984, Catholic University of America; LL.M., 1992, The Judge Advocate General's School, United States Army. This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 41st Judge Advocate Officer Graduate Course.

the grace of God go you or I.' Maybe we should be a little bit easier on the guy."

MEMBER **2:** "Are you kidding? We gave him the benefit of the doubt on the charges he pleaded not guilty to, and then after we acquit him, the judge tells us that earlier he had pleaded guilty to a separate offense. That ticks me off. I think he deserves the maximum sentence."

MEMBER 6: "I kind of agree with you—after all, he did make an unsworn statement during sentencing and the judge says that he can't be cross-examined. If he was telling the truth he would have made a sworn statement."

MEMBER *5:* "I thought we had agreed during findings that because it was a really close case, we'd go ahead and convict him of the offense, but then give him a break during sentencing."

MEMBER 7: "That's right. Plus, the victim was a bum who got what he deserved. Why punish this guy, who's got a good military record, just because some degenerate started a fight that the accused decided to finish?"

MEMBER **4:** "My biggest concern is how this will affect his retirement benefits. Anybody got any idea how that works?"

MEMBER 8: "Not exactly, but my brother-in-law is a parole officer, and he tells me that the average prisoner gets out on parole after serving less than a third of the adjudged sentence. So we better not be too lenient."

MEMBER **2:** "That brings up another issue. If this guy pleaded guilty he must have a pretrial agreement with the general. I know that we're not supposed to concern ourselves with that, but it sure seems to make this whole process a waste of time."

MEMBER **4:** "The only other thing I would like to mention is that this crime is awfully similar to the trial last week. The general sure was upset about the results of that court-martial."

MEMBER 1: "I know the judge told us to disregard it, but I can't help but think about the trial counsel asking that defense witness if he knew that the accused was an alcohol rehabilitation failure."

PRES: "Well, let's get down to business. Everybody write down what they think is an appropriate sentence . . ."

MEMBER *5:* "We're supposed to vote on the least severe proposed sentence first. Does anyone know whether a Bad Conduct Discharge, eighteen months, and a fine but no forfeitures, is less than a Dishonorable Discharge and twelve months confinement, with two-thirds forfeitures?"

Although the above scenario is admittedly a bit extreme, it is intended to demonstrate the multitude of issues that may cause a panel to reach an unjust sentence for an accused. Knowing that these are the factors that court members might consider during sen-

tencing deliberations, both the accused and the government are better served when a military judge, specifically trained in the laws and principles of sentencing, decides the sentence of the accused. Because so many inappropriate and irrelevant factors may be considered by members during their sentencing deliberations, the military must establish sentencing procedures that minimize the risks of these occurrences.

The risks of improper sentences from court members could be reduced through continued piecemeal changes to the current procedural rules governing sentencing. A far more efficient and effective change, however, is to eliminate court members from sentencing completely, and to turn the entire process over to military judges.

The normal courtroom procedure in this country is for the trial judge to determine the appropriate punishment for an offense. In the federal criminal system and in forty-two of the fifty states, judges decide the sentences in all noncapital criminal trials.' Jury sentencing has been criticized for a number of years. Some commentators have characterized it as "sanctified guessing,"[2] "sentencing by lottery,"[3] a "crapshoot,"[4] and "amateur brain surgery."[5] Although he did not question the constitutionality of jury sentencing, Justice Potter Stewart did have "serious questions about the

---

[1] The military's procedures for capital sentencing are beyond the scope of this thesis, other than to observe that the decision whether to sentence an accused to death is a matter far too grave to place on the shoulders of one person, no matter how well trained they may be in the science of sentencing. Consequently, this proposal to adopt mandatory military judge alone sentencing does not address recommended procedures for capital cases.

'Charles W. Webster, Jury *Sentencing—Grab-Bag* Justice, 14 Sw. L.J. 227 (1960).

[3] Russel W.G. Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed* System *of Court-Martial Sentencing,* ARMY LAW., July 1988, at 28 n.23 (citing testimony of Major General Kenneth J. Hodson before the Advisory Commission to the Military Justice Act of 1983).

[4] To gain insight into the current attitudes and opinions of those affected by the sentencing process, surveys were provided to prisoners at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, convening authorities, staff judge advocates, military judges, defense counsel, and senior commanders attending the Senior Officer Legal Orientation (SOLO) Course at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Responses were received from fifty-four defense counsel, sixty-eight prisoners, twenty-five SOLO Course attendees, forty-seven convening authorities, fifteen military judges, and sixty-eight staff judge advocates. Copies of this survey and the responses are on file in the library of The Judge Advocate General's School. This survey does not profess to be a model of scientific accuracy. Nevertheless, it represents the insights of a large portion of those individuals involved in the administration of military justice. References to responses to this survey [hereinafter Thesis Survey], along with a survey conducted by the Advisory Commission to the Military Justice Act of 1983, will be made throughout the remaining text. See *infra* note 10 (discussing the survey conducted by the Advisory Commission to the Military Justice Act of 1983). See also *infra,* note 167 (survey responses from defense counsel).

[5] E.A.L., *Jury Sentencing in Virginia,* 63 VA. L. REV. 991 (1967).

wisdom of such a practice."[6] Five of the thirteen states that at one time used the jury for sentencing have done away with that practice.[7]

Criticism of the military practice of court member sentencing can be traced to the historic *Crowder-Ansell* dispute following World War I.[8] Court member sentencing has come under more recent review during the revision of the 1984 *Manual* for *Courts-Martial* (1984 *Manual*). Congress tasked the Advisory Commission to the Military Justice Act of 1983 to conduct an in-depth analysis of several issues related to military justice including "whether the sentencing authority in courts-martial cases should be exercised by a military judge in all noncapital cases to which a military judge is detailed."[9]

Although many consider sentencing to be the most important phase of a criminal trial in terms of its impact on an accused's life,[10] it perhaps has been overshadowed by the attention given to the guilt or merits portion of a trial. Numerous statutes and rules of criminal procedure deal with proving the guilt or innocence of an accused, while very few are focused on determining an appropriate sentence once criminal guilt is proven beyond a reasonable doubt. Even the Constitution reflects a preoccupation with guilt as opposed to punishment. Of all the articles and amendments to the Constitution related to criminal trials,[11] the only restriction with respect to pun-

---

[6] Giacco v. Pennsylvania, 382 U.S. 339, 405 (1966) (Stewart, J. concurring).

[7] Indiana, Montana, North Dakota, Georgia, and Alabama have eliminated jury sentencing in noncapital criminal trials.

[8] Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 23 (1967). One of General Ansell's numerous proposals was that the military "court judge advocate" determine and impose an appropriate sentence. *See also* Robert D. Byers, The *Court-Martial* as *Sentencing Agency: Milestone or Millstone*, 41 MIL. L. REV. 105 (1968); M. Scott Magers, The Military Sentencing Procedure—Time for a Change 72 (1974) (unpublished LL.M. thesis, The Judge Advocate General's School, United States Army).

[9] I Advisory Commission to the Military Justice Act of 1983 Report at 61 [hereinafter Report]. The Advisory Committee recommended maintaining the status quo, but not without much debate and two separate opinions.

[10] Craig Reese, *Jury Sentencing in Texas: Time for a Change?*, 31 S. TEX. L.J. 331 (1990) (sentencing is at once, the most critical and criticized phase of the criminal justice system); *see also* United States v. DiFrancesco, 449 U.S. 117, 149-50 (1980) (Brennan J., dissenting) (sentencing phase as critical as guilt-innocence phase); Advisory Commission to the Military Justice Act of 1983 Survey at 26 (60% of defense counsel believe sentencing considerations more important than findings with respect to selecting forum). The Advisory Commission conducted a comprehensive survey of convening authorities, appellate court judges, staff judge advocates, and trial and defense counsel, in conjunction with their overall study of military justice. References to responses to this survey [hereinafter Survey] will be made throughout this article. The survey and responses to the survey are on file in the library of The Judge Advocate General's School.

[11] *See* U.S. CONST. art. III, § 2, cl. 3 ("The trial of all crimes, except in cases of

ishment is that it not be "cruel and unusual."[12] In a similar vein, of the twelve chapters in the Rules for Courts-Martial only one is devoted to sentencing.[13]

Prior to the recent phenomenon of sentencing guidelines, federal and state court judges were entrusted with grave sentencing responsibilities with few procedural limitations. This is likely due to trained judges, as opposed to juries, performing the sentencing function in most jurisdictions.[14] The military, on the other hand, to maintain the tradition of member sentencing, has created a convoluted sentencing process that often keeps relevant sentencing evidence from the court members because they cannot be trusted to apply it properly.[15]

Military justice historically has been a function of command. Much to the chagrin of commanders, control over military justice has shifted bit by bit from commanders to judge advocates and military judges.[16] Eliminating members from sentencing may be viewed as simply another step in this direction. Consequently, the decision to eliminate court members from sentencing likely depends on one's view on the much broader issue of whether courts-martial are a system of justice owned by attorneys," or a tool of discipline owned by commanders.[18] Predictably, the battle lines have been drawn

---

impeachment, shall be by jury. . . ."); Id. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .").

[12] *Id.* amend. VIII.

[13] MANUAL FOR COURTS-MARTIAL, United States, Chapter X, (1984) [hereinafter MCM].

[14] *See supra* text accompanying note 1; *see also infra* text accompanying notes 146-47.

[15] *See* United States v. Boles, 11 M.J. 195, 198 (C.M.A. 1981) ("[the President's] rules of sentencing procedure at courts-martial are still not as broad as those in operation in federal district courts. This may have something to do with the fact that members may sentence at courts-martial while a judge sentences in federal district court.").

[16] *See infra* notes 53-135 and accompanying text (tracing the development of our current sentencing procedures).

[17] *See* WINTHROP, MILITARY LAW AND PRECEDENTS, 444-46 (2d ed. 1920) (court-martial is a criminal judgment of a court of the United States, not an expression of the will of the command or its officers in disciplinary matters) *cited in* Report, *supra* note 9, at 98. *See also* William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 21 (1971) (A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function it will promote discipline).

[18] *See* Report, *supra* note 9, at 36, (quoting testimony of Major General John Galvin, before the Advisory Commission to the Military Justice Act of 1983, that the "principle purpose of [military justice] is the maintenance of discipline on the battlefield"); Winthrop, *supra* note 17, at 49 (courts-martial "are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein"); Colonel John H. Wigmore, Address Before the Mary-

between lawyers and commanders. Attorneys believe military judges are better qualified to assess appropriate sentences, while convening authorities and commanders feel panels are better suited to perform this task.[19]

An understanding of what constitutes an appropriate sentence is necessary before one can determine who is better suited to determine the proper punishment in a military court-martial. The civilian court system generally recognizes four purposes for sentencing: (1) punishment-retribution; (2) general deterrence; (3) incapacitation-individual deterrence; and (4) rehabilitation.[20] An additional and extremely important purpose in the military is for the sentence to aid the command's efforts to maintain good order and discipline.[21]

Sentencing trends in the federal and state courts have shifted over time from strict retribution for the offense—an eye for an *eye*—to individualized sentences focusing more on the offender and rehabilitation.[22] However, with the demise of rehabilitation efforts, the tough anticrime legislation of the 1980s, and the emergence of sentencing guidelines, the trend has begun to turn back towards retribution for the offense and general deterrence.

The military has experienced similar trends with respect to the perceived goals of sentencing. Prior to 1949, sentences focused more on retribution, general deterrence, and incapacitation of the offender, as no provision existed in the Manuul for Courts-Martial *(Manual)* for evidence to be offered about the offender. Under the 1951 *Manual,* members had access to information about the defendant and sentences began to focus more on rehabilitation.[23] But because of the high quality of the all-volunteer force in the 1980s

---

land State Bar Association (June 28, 1919), *in* 24 MD. STATE BAR ASS'N TRANSACTION, 1919, at 188 ("The prime object of military organization is Victory, not Justice. . . . If it can do justice to its men, well and good. But Justice is always secondary, and Victory is always primary) *cited in* Brown, *supra* note 8, at 13.

[19] *See* Survey, *supra* note 10, at 21. Respondents were asked which sentencing authority had the most knowledge of the ramifications of sentences imposed and were given choices of "officer panels," "officer and enlisted panels," "military judges," and "all equally qualified." Convening authorities narrowly selected officer and enlisted panels (except Air Force convening authorities, who selected judges), with the other two selectors about even. However, all lawyer groups overwhelmingly selected judges.

[20] *See* Reese, *supra,* note 10, at 331.

[21] DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 2-59 (1 May 1982) (C1, 15 Feb. 1985) [hereinafter BENCHBOOK].

[22] *See* Reese, *supra* note 10, at 331.

[23] *See* Westmoreland, *supra* note 17, at 22. "Military justice must provide a method for the rehabilitation of as many offenders as possible . . . Because manpower is our most precious asset in the Army, conservation of human resources is of primary concern."

and the more recent downsizing of the military, rehabilitation has lost its attractiveness.[24]

Although some specific purposes of sentencing—retribution or rehabilitation—have fallen in and out of popularity, the wiser practice, and avowed goal of sentencing in today's military, is to adjudge a sentence that considers all five purposes previously enumerated.[25] This is not a simple task.[26] To adjudge a sentence that achieves these goals, the sentencing body must: **(1)** have access to all relevant information about the accused; **(2)** understand the principles of penology and the administrative consequences of sentences adjudged; **(3)** treat accused soldiers fairly and equally;[27] and **(4)** understand the impact the sentence will have on military discipline. This is far too difficult a task to be left to court members who are untrained and inexperienced in the science of criminal sentencing.

To evaluate the merits of adopting mandatory sentencing by military judges, this article will examine the development and implementation of current sentencing procedures. This article then will evaluate these procedures from the perspective of the people most affected by them—namely, the accused, the government trial counsel, commanders, court members, military judges, and the general public.

II. Current Sentencing Procedures Under the Uniform Code of Military Justice

A. Forum Options

Soldiers facing courts-martial may choose from four different options regarding their plea and the composition of their court-martial. They may elect to: **(1)** be tried by members on both the merits and sentencing; **(2)** be tried by a military judge on both the merits and sentencing; **(3)** plead guilty before a military judge and be sentenced by members; or **(4)** plead guilty and be sentenced by a military judge.[28] The option soldiers do not have is to be tried by members on the merits but sentenced by a military judge.[29] This often

---

[24] *See* United States v. Motsinger, **34** M.J. **253** (C.M.A. **1992)** (president of special court-martial wrote letter to convening authority requesting suspension of bad-conduct discharge because it was adjudged out of "recognition of quality force and impending force drawdown requirements"). Today we have such an abundance of good recruits there is no need to keep even the "smallest time" criminal.

[25] *See* BENCHBOOK, ***supra*** note **21,** para. **2-59.**

[26] *See* ***infra*** note **250** and accompanying text (discussing how difficult the sentencing function is for even the most trained jurist).

[27] *See* E.A.L., ***supra*** note **5,** at **969.**

[28] *See* MCM, *supra* note **13,** R.C.M. **903, 910.**

[29] Nor can soldiers elect to have a military judge for the merits and members for sentencing.

poses a significant problem for the accused, because the sentencing consequences of his or her choice between members or the military judge may prevent him or her from choosing the most favorable forum with respect to guilt. A common belief exists among many of those who practice military justice that, *as a general rub,* an accused stands a better chance of acquittal with members.[30] However, it is also the general consensus that if convicted by members, an accused often stands a greater risk of being punished severely by the same members during sentencing.[31] In light of this phenomenon, defense counsel are more likely to advise their clients to forfeit their right to trial by members to avoid the heightened risk of a more severe sentence.[32]

Although the *Manual* gives the accused the right to request trial by military judge alone, this right is not absolute.[33] The military judge has the discretion to grant or deny the request, which may force the accused to be tried and sentenced by a forum not to his liking.[34] Common reasons for disapproving requests for trial by judge alone are if the military judge has tried a coaccused, or has heard

---

[30] 36 of 54 defense counsel surveyed stated that if given the option of members for findings and judge alone for sentencing, they would advise their clients to elect this option, because the client stood a better chance of acquittal with members. A large number of staff judge advocates indicated that they based their advice concerning forum choice on the nature of the offense. For a purely legal defense, most staff judge advocates would recommend a military judge for findings—*i.e.*, "good law, go military judge; good facts, go jury." In all other cases, the vast majority of staff judge advocates believed that an accused stood a better chance of acquittal with members. Their comments included, "jury easier to mislead on the facts," "inexperienced panel easy to sell defense to," "more chance of jury nullification with members," easier to get acquittal particularly if defense counsel is trying to sell them snake oil,'' and "members are easier to confuse or get wrapped up over something inconsequential." Thesis Survey, *supra* note 4.

[31] Thirteen of fifty-four defense counsel volunteered this specific comment when asked what kind of advice they generally give their clients on the advantages and disadvantages of being tried and sentenced by judges versus members. Thesis Survey, *supra* note 4. Although defense counsel remarked that their clients were more likely to be punished severely by court members, they also recognized that they often stood a greater chance of receiving a more lenient sentence from members as opposed to a judge who is perceived as being more likely to sentence within a more predictable range. See *infra* notes 186-87 and accompanying text.

[32] Survey, *supra* note 10, at 25. Sixty percent of defense counsel stated that sentencing considerations are much more important than findings in forum selection.

[33] UCMJ art. 16 (1984); MCM, *supra* note 13, R.C.M. 903(b)(2). See United States v. Singer, 380 U.S. 24, 36 (1965) ("a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury").

[34] *See* United States v. Sherrod, 26 M.J. 30 (C.M.A. 1980), in which the military judge was challenged for cause because his daughter was friends with the victim of the charged offenses of indecent acts. The judge denied the challenge. Appellant nonetheless "felt so constrained to avoid court-martial with members that he requested trial by the very same judge." The military judge also denied this request out of concern that others might perceive bias on his part, and directed that appellant be tried by members. The accused subsequently was sentenced to the "literal maximum punishment" by the members.

testimony during an improvident plea.[35] A former Chief Judge of the United States Court of Military Appeals (COMA), Robinson Everett, recognized that this discretion can cause problems for an accused, because the accused often has very cogent reasons for wanting trial by judge alone: "namely, (a) a desire to be tried [and sentenced] by an official who is not under the command of the convening authority who referred the charges for trial; and (b) a wish to have guilt adjudged and sentence imposed by an officer who is legally trained."[36]

Although the soldier facing court-martial does not have an absolute right to trial by military judge, he does have more control over the matter than his civilian counterpart facing charges in federal court. Federal Rule of Criminal Procedure 23b requires the consent of both the trial judge and the prosecutor for the accused to be tried by judge alone; Rule for Courts-Martial (R.C.M.) 903 requires only the consent of the military judge, not the trial counsel or convening authority.[37] However, civilian defendants, when making that forum choice, need not concern themselves with the sentencing consequences of that decision, because all sentences are determined by the judge. However, the military accused must accept the consequences of being sentenced by members should he choose to be tried by members on findings. Consequently, soldiers facing court-martial may feel pressured to forfeit their right to a trial by their peers to avoid being sentenced by them.[38]

B. Presentencing Hearing

Presentencing hearings are governed by R.C.M. 1001 through 1011. The general procedures permit the government to present its case in aggravation through documents and live witnesses, subject to cross-examination. The defense then is permitted to offer evidence of extenuating and mitigating circumstances, also through documentary evidence and the testimony of live witnesses. The accused may make a sworn statement subject to cross-examination, or an unsworn statement subject only to rebuttal.[39] Rebuttal and surrebuttal may follow at the discretion of the military judge. After coun-

---

[35] *Id.*

[36] **United States v. Butler, 14 M.J. 72, 74 (C.M.A. 1982) (Everett, C.J., concurring). Judge Everett also noted that "[i]n view of the Uniform Code's purpose of eliminating 'command influence' and concerning the professionalism in military justice, these reasons have the blessings of Congress."** *Id.*

[37] **Congress deliberately chose not to involve the convening authority in this decision to avoid the "possibility of undue prejudicial command influence."** *Id.* **at 78 (citing S. REP. No. 1601, 90th Cong., 2d Sess. (1968),** *reprinted in* **1968 U.S.C.C.A.N. 4501,4504-05).**

[38] ***See supra* note 32; see *also infra* text accompanying notes 171-72.**

[39] **MCM,** *supra* **note 13, R.C.M. 1001(c)(2).**

sel present their respective arguments on sentencing, the members are instructed by the military judge before they close to deliberate.

With respect to the government's case in aggravation, the only evidence that *must* be presented to the sentencing body is the pay and service data of the accused and the duration and nature of any pretrial restraint, all of which is listed on the charge sheet.[40] Whether additional evidence is offered in aggravation is left to the discretion of the trial counsel. Provided that admissibility requirements can be satisfied, the trial counsel may offer personnel records,[41] evidence of prior convictions,[42] evidence in aggravation,[43] and opinion evidence regarding the duty performance and rehabilitation potential of the accused.[44]

The accused then may present rebuttal evidence and other matters in extenuation and mitigation[45]—or choose to remain silent and offer no evidence on sentencing. Because nothing is required from the accused and little of the government during presentencing, it is not unusual for the sentencing body to be lacking in information about the accused when it begins its sentencing deliberations. This lack of information about the accused is perhaps the biggest flaw in the military's current sentencing procedure, particularly when compared to the comprehensive presentencing reports prepared in federal and some state criminal courts.[46]

The lack of detailed sentencing instructions for court members is another aspect of court-martial sentencing subject to criticism. The only instructions the military judge is required to give the members include: (1) guidance on the maximum punishment; **(2)** guidance on the procedures for deliberation and voting; **(3)** advice that they are solely responsible for adjudging an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and **(4)** instructions that they should consider all matters in extenuation and mitigation and aggravation.[47]

The *Military Judges' Benchbook (Benchbook)* provides addi-

---

[40] *Id.* R.C.M. 1001(b)(2).

[41] *Id.*

[42] *Id.* R.C.M. 1001(b)(3).

[43] *Id.* R.C.M. 1001(b)(4).

[44] *Id.* R.C.M. 1001(b)(5).

[45] *Id.* R.C.M. 1001(c). **The military judge may relax the rules of evidence for the presentation of defense evidence.** *Id.* R.C.M. 1001(c)(3).

[46] **This is not to say that the military justice system has not vastly improved the amount of personal information it now permits the judge or members to hear about an accused.** *See infra* **notes 99-134 and accompanying text tracing the development of military sentencing procedures.**

[47] *Id.* R.C.M. 1005(e). **See also** BENCHBOOK, *supra* **note 21, para. 2-37.**

tional guidance to military judges regarding supplemental instructions judges should give members, such as describing the different punishments, advising the members that "no punishment" is an option, that a guilty plea is a matter in mitigation and may be the first step toward rehabilitation, an explanation of sworn versus unsworn statements, and that the accused will be given credit for any pretrial confinement served.[48] The military judge is given the discretion to decide whether to instruct the members on the accused's mendacity,[49] and other matters raised by the particular facts of a case,[50] or specifically requested by the trial counsel, defense counsel, or the members.[51] Most military judges conclude their instructions with the following general guidance regarding the overall goals of sentencing:

> In accordance with your best judgement based on the evidence that has been presented in this case, your own experiences and general background, you should select a sentence which best serves the ends of good order and discipline in the military, the needs of the accused, and the welfare of society.[52]

III. Origins of Current Military Sentencing Procedures

America's federal, state, and military criminal justice systems all developed during a period in history when the public feared the

---

[48] BENCHBOOK, *supra* note 21, para. 2-37. Even though members are instructed on the duration and nature of pretrial confinement and that the accused will receive credit for any pretrial confinement served, they are not told how to account for this during sentencing deliberations. *See* United States v. Balboa, 33 M.J. 304, (C.M.A. 1991), where the members sentenced the accused to 12 months and 68 days, in an ineffective attempt to compensate for 68 days of pretrial confinement. In his concurring opinion, Chief Judge Everett remarked, "[t]his Court does not need a crystal ball to discern the real likelihood that as a practical result of the members' action appellant has been denied the legally required credit for his pretrial confinement." *Id.* at 307-8.

[49] BENCHBOOK, *supra* note 21, para. 2-60.

[50] MCM, *supra* note 13, R.C.M. 1005(e)(4) discussion. The judge does so at his or her own risk. *See infra* notes 188-91 and 304-19 and accompanying text (discussing risks of appellate issues created by a military judge's sentencing instructions to the court members).

[51] MCM, *supra* note 13, R.C.M. 1005(b),(c) (although members may recommend suspension or clemency of any portion of the sentence, the military judge is not required to instruct them on this matter unless one of the members happens to discover it and asks the military judge for guidance). *See* BENCHBOOK, *supra* note 21, paras. 2-54, 2-55.

[52] BENCHBOOK, *supra* note 21, para. 2-39. *See also* Grove, *supra* note 3, at 27: "The closest thing to a statement of sentencing policy in the MCM is in its preamble: 'The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and to thereby strengthen the national security of the United States.'"

threat of oppressive, foreign appointed judges presiding over criminal trials.[53] In light of this fear, one of the earliest criminal procedures developed was the protection of the right to trial by a jury of one's peers.[54] Another factor contributing to the popularity of trial by jury was the paucity of trained jurists, which led to the perception that little difference existed between a judge and a lay jury.[55] One might have expected that these circumstances would have led to the adoption of jury sentencing as well, but that did not occur. The federal government and the vast majority of states all adopted the British tradition of mandatory judge sentencing.[56] In similar fashion, the American military looked to the British Army for guidance, and adopted its practice of having the court-martial adjudge the sentence as well as determine guilt.[57]

A. Early History of Military Justice

Most military legal scholars agree that the origins of American military justice can be traced to The Code of Articles promulgated in 1621 by Swedish General Gustavus Adolphus.[58] General Adolphus was the first commander to appoint a judge advocate to his staff. He also developed a two-tier system of courts-martial very similar to the military's current general and special courts-martial.[59] Sentencing in these early courts-martial was performed by the members, who had absolute discretion unless the punishment was fixed by decree.[60]

The American Army's first formal code—the American Articles of War of 1775—closely mirrored the British Code which had evolved from the code of General Adolphus.[61] Like the British and Swedish codes, sentencing was the duty of the members.[62] With the excep-

---

[53] Reese, *supra* note 10, at **325.**

[54] *Id.* at **325** n. **16.**

[55] E.A.L., *supra* note **5,** at **970.**

[56] *See infra* notes **142-160** and accompanying text (discussing the federal and state sentencing procedures).

[57] *See* Winthrop, *supra* note **17,** at **21-24,** *cited in* Report, *supra* note **9,** at **65.**

[58] *Code of Articles of King Gustavus Adolphus of Sweden, reprinted in* Winthrop, *supra* note **17,** App. III, at **907-18,** *cited in* Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment— A Short History of Military Justice,* **11** A.F. L. REV. **213 (1969).**

[59] Anthony J. DeVico, *Evolution of Military Law,* **21** JAG J. **64** (Dec. **1966-Jan. 1967).**

[60] Rollman, *supra* note **58,** at **214** (threatening to strike a superior officer, "whether hee hit or misse" resulted in loss of the right hand. Other offenses were left to the discretion of the members "according to the importance of the Fact," or "what punishment they [Council of War] thinke convenient.").

[61] *Id.* at **215.** George Washington was a member of the five-man committee that drafted these articles. *See* Walter T. Cox III, *The Army, The Courts and the Constitution: The Evolution of Military Justice,* **118** MIL. L. REV. **5-6 (1987).**

[62] There was no one else to perform this task, because courts-martial were composed only of court members at this time.

tion of a few offenses, the members had complete discretion regarding the punishment to be adjudged.[63] Unfortunately, the members usually had access to very little information about the accused on which to exercise their abundant discretion. Because the Articles of War of 1775 did not provide a separate sentencing hearing, the sentence was based solely on the evidence presented on the merits.[64]

The Articles of War of 1775 were modified in 1776 by Thomas Jefferson, John Adams, and three others. Notable changes included: increasing the mandatory sentences for several offenses; authorizing death as a punishment for more offenses; precluding execution of sentences until a report was made to Congress, the General, or Commander-in-Chief; and providing for a second court-martial based on vexatious appeals.[65] The Articles were amended again in 1786 to require the Secretary of War's approval for any sentence that included death or dismissal of an officer. All other punishments could be approved by the appointing authority.[66]

The American Articles of War of 1806 created the new offenses of disrespect to the President, Vice President, or Congress, and absence without leave as we know it today. Death could be adjudged only by a general court-martial, and required concurrence of two-thirds of the members.

One of the most significant changes made with respect to sentencing was the 1890 amendment to the Articles of War of 1874,

---

[63] *See* Rollman, *supra* note 58, at 215. Punishments generally were prescribed in terms of "as a general or regimental court-martial might order," "according to the nature of the offense," or "in the court's discretion"—for example, article IV, provided that: "[a]ny officer who shall behave himself with contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor, shall be punished according to the nature of the offense by the judgment of the general court-martial." Examples of mandatory sentences included a fine of four shillings for cursing or swearing and death for anyone shamefully abandoning their post.

[64] *See* Winthrop, *supra* note 17, at 390-91. Even worse for the accused was that evidence of good character and an exemplary military record was not admissable on the merits in most instances. If an accused pleaded guilty, a provision existed allowing the members to hear evidence of the circumstances surrounding the offense, unless the specification was so descriptive as to disclose all the circumstances of mitigation or aggravation that accompanied the offense. *See* RAY, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES, 24 (1890) (citing Winthrop, *supra* note 17, at 376), *cited in* Denise A. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 n.118 (1986).

[65] Rollman, *supra* note 58, at 216 ("if on a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the . . . general court"). Benedict Arnold may have been one of the first soldiers displeased with the results of his court-martial. It is alleged that one of the reasons leading to his decision to become a "turncoat" was his belief that he had been wronged by General Washington and Congress during his court-martial at West Point in 1780. Cox, *supra* note 61, at 6.

[66] Rollman, *supra* note 58, at 217.

which severely curtailed court members' discretion during sentencing. No longer could punishment "in time of peace, be in excess of a limit which the President may prescribe."[67] A table of maximum punishments was published one year later.[68]

During these early years of military justice, members had very little evidence on which to adjudge an appropriate sentence. There was no sentencing hearing,[69] evidence of prior convictions was strictly limited,[70] and evidence in extenuation and mitigation could not be offered unless it was relevant to the merits.[71] Consequently, the sentences adjudged under these procedures emphasized uniformity and retribution as attention focused on the offense, and not the individual offender.[72]

Although given practically complete discretion with respect to sentencing from the very beginning, it was not until the 1917 *Manual for Courts-Martial* (1917 *Manual*) that members were given any kind of guidance regarding the ends to which they should apply their discretion. The 1917 *Manual* contained detailed information about the United States Disciplinary Barracks at Fort Leavenworth, Kansas; the new policy permitting suspension of the punitive discharge for purely military offenses and the return to duty of those soldiers successfully rehabilitated;[73] and numerous other considerations that

---

[67] *Id.* at 218. See Winthrop, *supra* note 17, App. XIV, at 998.

[68] Rollman, *supra* note 58, at 218.

[69] *See supra* note 64 and accompanying text.

[70] Only courts-martial convictions were permitted, and they had to be "final." They also required formal proof by either the record of trial or authenticated copies of court-martial orders. See Vowell, *supra* note 64, at 26.

[71] *Id.* at 26-27. Fortunately for the accused, relevance was broadly construed and courts permitted accused soldiers to offer character evidence in mitigation on the merits.

> At military law, evidence of character, which is always admissible, is comparatively seldom offered strictly or exclusively in defense; but, when introduced, is usually intended partly or principally, as in mitigation of the punishment which may follow on conviction. . . . It need have no reference to the nature of the charge, but may exhibit the reputation or record of the accused in the service, for efficiency, fidelity, subordination, temperance, courage, or any of the traits or habits that go to make the good officer or soldier. It also need not be limited to general character, but may include particular acts of good conduct, bravery, &c (etc.).

Winthrop, *supra* note 17, at 351-52.

Nevertheless, recognize that the original intent was that the reviewing authority, and not the court members, consider such matters as good character or an exemplary military record. "Regularly, however, the same is rather ground for mitigation of punishment by the reviewing authority than for a milderjudgement on the part of the court." *Id.* at 396. *See infra* notes 291-301 and accompanying text (discussing the dangers of relying on posttrial review to correct inappropriate sentences).

[72] *See* Vowell, *supra* note 64, at 25.

[73] MANUAL FOR COURTS-MARTIAL, United States, para. 340 (rev. ed. 1917) [here-

might affect the type and amount of punishment adjudged.[74] Thus began the long, slow trend toward individualized sentences that focused less on the offense and more on the offender. Although members now were expected to focus more on the individual, the sentencing procedures continued to provide them little access to information about the accused.

The 1921 *Manual for Courts-Martial* **(1921** *Manual)* **attempted to fill this void by permitting the members to consider the statement** of **service on the first page of the charge sheet.[75] This contained data on the accused's current enlistment, age, pay rate, allotments, prior service, character of any prior discharges, and dates of any pretrial restraint. The 1928** *Manual for Courts-Martial* **(1928** *Manual),* **also provided additional guidance to the members on what they might consider,[76] but again failed to provide the members meaningful guidance on what the sentence should hope to achieve.77**

---

inafter **1917** MANUAL]. The practice at this time was to permit the court members to take the *Manual* with them into the deliberation room. ***See*** Vowell, *supra* note **64,** at **29.**

[74] *Id.* at **342.** The MANUAL provided the following:

> In cases where the punishment is discretionary the best interest of service and of society demand thoughtful application of the following principles: That because of the effect of confinement on a soldier's self-respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required.

See Vowell, *supra* note **64,** at **29.**

[75] MANUAL FOR COURTS-MARTIAL, United States, para. **271** (rev. ed. **1921)** [hereinafter **1921** MANUAL]. This change, along with the existing practice of opening the court after findings to advise the members of prior courts-martial convictions, were the genesis of our modern presentencing hearings. ***See*** Vowell, *supra* note **64,** at **31-32.**

[76] Members were advised that they should consider "the character of the accused as given on former discharges, the number and character of previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof . . ." MANUAL FOR COURTS-MARTIAL, United States, para. **80** (rev. ed. **1928)** [hereinafter **1928** MANUAL]. This same paragraph also advised members that a light sentence in cases triable by civilian courts might adversely affect the public's opinion of the **Army.** ***See*** Vowell, *supra* note **64,** at **32.**

[77] "To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment." **1928** MANUAL, *supra* note **76,**

One other notable characteristic of early military justice practice is that the decisions of courts-martial, with the exception of jurisdictional issues, could not be modified or set aside by The Judge Advocate General.[78] The appointing authority had absolute discretion to act on the findings and sentence. By custom of service he could return an acquittal or lenient sentence to the court-martial for reconsideration with a view toward greater punishment.79

B. Post-World War I Developments in Military Justice

Following World War I, the military justice system, like the rest of the military, was subject to a significant after-action review. The post-World War I changes to military justice grew out of the historic *Crowder-Ansell* disputes.[80] In 1917, several enlisted soldiers assigned to Fort Bliss, Texas, refused to attend a drill formation. They were court-martialed and sentenced to a dishonorable discharge and confinement ranging from ten to twenty-five years. After the appointing authority ordered the sentence executed, the record of proceedings was forwarded to the Office of The Judge Advocate General for review.[81] The cases were forwarded to Brigadier General (BG) Samuel T. Ansell, Acting The Judge Advocate General[82] for review. Brigadier General Ansell directed that the findings be set aside for legal error. He was of the opinion that his powers of review authorized him to modify or set aside findings and sentence for lack of jurisdiction or for serious prejudicial error.[83] This was a radical departure from views held by former Judge Advocates General.

Major General (MG) Crowder, The Judge Advocate General, opposed BG General Ansell's position. He believed that The Judge Advocate General's review simply was advisory except for jurisdic-

---

para. 80. Paragraph 80 of the **1949** *Manual* included an instruction to the members to consider the need to render uniform sentences for similar offenses throughout the Army. Unfortunately, it did not provide a mechanism whereby members could know what sentences were being adjudged for similar offenses.

[78] Brown, *supra* note 8, at 29.

[79] *Id.* at 28. This authority subsequently was repealed. Headquarters, Dep't of Army, Gen. Orders No. 88 **(14** July **1919).**

[80] *See generally* Brown, *supra* note 8 (an in-depth analysis of this tumultuous period in the Judge Advocate General's Corps history).

[81] *Id.* at 1. At approximately the same time, several black soldiers in Houston, Texas, were court-martialed for murder, mutiny, and riot. They were convicted and then hanged two days after the completion of the courts-martial. The Office of The Judge Advocate General did not receive copies of the record of proceedings in these cases until four months after the sentences had been executed. Id.

[82] Major General Enoch H. Crowder was performing the duty of Provost Marshall at the time. Id. at 2.

[83] *Id.* at **4.**

tional matters.[84] The War Department ultimately adopted MG Crowder's view.[85] In the end, however, the debate shifted to Congress which eventually adopted several of BG Ansell's proposals in the 1920 Articles of War.[86] Congress eventually approved several other proposals of BG Ansell as well.[87]

C. Post-World War II Developments in Military Justice

During World War II, over sixteen million men and women served in the armed forces. Approximately two million courts-martial were convened, one for every eight service members. An average of sixty convictions were returned for every day the war was fought.[88] Consequently, many soldiers left the service with a very poor view of military justice.[89] The heavy caseload and unfair treatment received by numerous soldiers during World War II demonstrated the competing interests of military justice during time of war. On the one hand, the military must have the means to enforce disci-

---

[84] *Id.* at 5-6. *See also* Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1969).

[85] A compromise of sorts was achieved through a new general order which established boards of review. These boards were to review all death sentences and those involving dismissal and dishonorable discharges prior to execution. Headquarters, Dep't of Army, Gen. Orders No. 7 (7 Jan. 1918). Wiener, *supra* note 84, at 115.

[86] *See* Brown, *supra* note 8, at 15-42 (staff judge advocate pretrial advice; appointment of military counsel, or civilian counsel of choice provided by the accused; selection of court-martial members "best qualified by reason of age, training, experience and judicial temperament;" challenges for cause and one peremptory challenge; staff judge advocate posttrial review; prohibition against returning for reconsideration an acquittal or reconsideration of a sentence imposed "with a view to increasing its severity;" established a board of review and prohibited execution of any sentence that included death, dismissal, or dishonorable discharge until the board of review concluded that it was legally sufficient; and requirement for unanimous votes for death, three-fourths majority for sentence in excess of 10 years, and two-thirds majority for any other sentence).

[87] *Id.* at 39-42 (creation of a civilian court of military appeals (art. 67, UCMJ), plenary power of court judge advocate over the conduct of the court-martial (arts. 26 and 51b, UCMJ); and one-third enlisted members at accused's request (art. 25 UCMJ)).

[88] Cox, *supra* note 61, at 11 (citing W. Generous, SWORDS AND SCALES 3-13 (1973); Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 n.3 (1972)).

[89] Perhaps the classic case of maltreatment under the UCMJ involved Second Lieutenant Sidney Shapiro. He had been appointed to defend a soldier accused of assault with intent to rape. At trial he substituted another soldier at the defense table for the accused. The alleged victim identified the interloper as the attacker, and the court convicted him of the charge. Shapiro then revealed his scheme to the court. The convening authority did not take kindly to Shapiro's tactics and preferred charges against him for "delaying the orderly progress" of a court-martial under the 96th Article of War. The charge was served at 1240 hours, trial commenced at 1400, and Shapiro was convicted and sentenced to be dismissed from the service by 1730 hours that same day. After being dismissed, the Army promptly drafted him back into the Army as a private. Shapiro's client did not fair much better, as he was later retried and convicted of the original charge. *See* Generous, *supra* note 88, at 169-70; LUTHER WEST, THEY CALL IT JUSTICE 39-40 (1977); DeVico, *supra* note 59, at 66.

pline on a large scale during hostile operations. Balanced against this is the competing interest of ensuring the legal rights of the individual soldier are not abused.[90]

The post-World War II review resulted in drastic changes to military justice. The 1951 Uniform Code of Military Justice (UCMJ) brought all four services under one code; established the COMA;[91] provided the accused the right to remain silent;[92] prohibited double jeopardy;[93] and guaranteed soldiers the right to counsel.[94]

By far the most significant change made to military justice was the creation of the *law* officer—an attorney who would be responsible for the fair and orderly conduct of the proceedings in accordance with the law.[95] The law officer would sit apart from the members,[96] instruct them on the applicable law, and make interlocutory rulings.[97] During congressional hearings, Professor Edmund Morgan advised Congress that the law officer "will now act solely as a judge and not as a member of the court, which becomes much like a civilian jury" and that "the law officer now becomes more nearly an impartial judge in the manner of civilian courts."[98]

The 1951 *Manual* also codified the adversarial presentencing hearing. Under the 1951 *Manual*, the prosecution and defense were permitted to present "appropriate matter to aid the court in determining the kind and amount of punishment to be imposed."[99] As before, members were advised of the service data on the charge sheet and evidence of prior convictions. In guilty pleas, however, the trial counsel now could offer evidence in aggravation of the offense, subject to defense counsel cross-examination and rebuttal.[100] The

---

[90] DeVico, *supra* note 59, at 66.

[91] UCMJ art. 67 (1951).

[92] UCMJ art. 31 (1951).

[93] UCMJ art. 44 (1951).

[94] UCMJ arts. 27, 38 (1951).

[95] UCMJ art. 39b (1951).

[96] Previously, the law officer was known as the court judge advocate, who sat with the members and remained present during deliberations and voted like the other members. Frequently, he was not a judge advocate. See United States v. Griffith, 27 M.J. 42, 45 (C.M.A. 1988).

[97] *Id.*

[98] Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. (1949) (Professor Morgan was Royall Professor of Law Emeritus, Harvard University, Frank C. Rand Professor of Law, Vanderbilt University, and a former Lieutenant Colonel, The Judge Advocate General's Department, where he served as Assistant to the Judge Advocate General, United States Army. Professor Morgan also served as Chairman of the Defense Department Committee on the Drafting of a Uniform Code of Military Justice).

[99] MANUAL FOR COURTS-MARTIAL, United States, para. 75a (rev. ed. 1951) [hereinafter 1951 MANUAL].

[100] *Id.* para. 75b(3).

1951 *Manual* also allowed the accused to make an unsworn statement, and enabled the law officer to relax the rules of evidence for the accused's presentation of extenuating and mitigating evidence.[101]

The 1951 Manual also contained additional guidance on what matters the members could consider during sentencing deliberations.[102] They were cautioned to adjudge the maximum sentence only in the most aggravated cases or instances of prior convictions. Members were encouraged to adjudge uniform sentences for similar offenses with the understanding that the special needs of the local community might justify a more severe punishment. Members were not to rely on higher authority to mitigate a sentence, but they were to keep in mind the effects a light sentence might have on the local community's perception of the military in those cases that also could be tried in civilian courts.[103] Finally, the 1951 *Manual* included a discussion on the two types of punitive discharge and when each would be an appropriate part of a sentence.[104]

D. Post-Vietnam War Developments in Military Justice

Criticism of military justice during the Vietnam War prompted Congress to enact the most sweeping changes ever made to military justice. The Military Justice Act of 1968 created the position of military judge, and provided soldiers the option to be tried and sentenced by a military judge sitting without members.[105] Congress created an independent trial judiciary designed to give military judges the same functions and powers their civilian counterparts possessed.[106]

Presentencing procedures were changed to permit argument by counsel and admission of the entire "personnel records" of an accused, as opposed to just their "service record."[107] Members no

---

[101] *Id.* para. 75c. *See* Vowell, *supra* note 64, at 35-36.

[102] UCMJ art. 76a(4) (1951).

[103] 1951 MANUAL, *supra* note 99, para. 76a(5).

[104] *See id.* paras. 76a(6), (7).

[105] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1355; UCMJ arts. 4e, 53d (1969). *See generally* Criminal Law Div. Note, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 25 (Military Justice Act of 1968 reflected wartime criticism that the system lacked individual procedural safeguards and that unlawful command influence had poisoned the fairness of courts-martial. Congress concluded that the military justice system needed a substantial overhaul to convince the public that 'the system actually protected the rights of accused service members.).

[106] Sam J. Ervin, *The Military Justice Act of 1968,* 45 MIL. L. REV. 77 (1969); United States v. Griffith, 27 M.J. 42, 45-46.

[107] MANUAL FOR COURTS-MARTIAL, United States, para. 75b. (rev. ed. 1968) (hereinafter 1968 MANUAL]. "Service records" was a technical term referring to only a

longer were instructed on the need for uniform sentences, or the effect of light sentences on the reputation of the armed forces. In effect, the goal was to give members even greater discretion in adjudging an appropriate sentence.[108]

To assist military judges with their newly created authority and responsibility, the Army published the Military ***Judges' Benchbook (Benchbook).***[109] The ***Benchbook*** provides a detailed script for judges and counsel to follow during both the merits and sentencing portions of the court-martial, along with sample instructions for trials with members.[110]

Several provisions of the Military Justice Act of 1968 simply codified earlier judicial opinions reached by the COMA between 1951 and 1968. In United States *v.* ***Mamaluy***,[111] the COMA held that the court members were not to 'consider sentences in similar cases despite the language of paragraph 76a encouraging uniform sentences.[112] Similarly, in United States *v.* ***Rinehart***,[113] the COMA eliminated the long-standing military practice of permitting the members to consult the Manual during deliberations, and emphasized that the sole source of instruction on the law would be the military judge.[114]

The COMA further attempted to relax the rules of evidence during sentencing in hopes of expanding the information that counsel could present to the sentencing body.[115] Unfortunately for trial counsel, these rules rarely were relaxed for the government.[116] Evi-

---

portion of a soldier's personnel records. Under the change, any records properly maintained in accordance with departmental regulations that reflected past military efficiency, conduct, performance, and history of the accused could be offered by counsel.

[108] *See* Vowell, *supra* note 64, at 54.

[109] BENCHBOOK, *supra* note 21.

[110] *See infra* notes 304-19 and accompanying text (discussing jury instructions for sentencing).

[111] 27 C.M.R. 176, 180 (C.M.A. 1959).

[112] The Air Force Board of Review reached a similar result several years earlier in United States v. Dowling, 18 C.M.R. 670 (A.F.B.R. 1954), when it upheld the law officer's decision denying the members' request for information on sentences in comparable cases. The Air Force Board concluded that the provisions of paragraph 76a simply meant that members should consider cases that they previously had adjudged. **See** Vowell, *supra* note 64, at 38 n.180.

[113] 24 C.M.R. 212 (C.M.A. 1957).

[114] *Id.* at 215-16. In *Rinehart*, the trial counsel encouraged the members to discharge appellant by referring them to paragraph 33h of the 1951 *Manual*, which stated that retention of thieves "injuriously reflects on the good name of the military service and its self-respecting personnel." The court concluded that permitting the members to use the manual would expose them to impermissible command influence. Id. at 215. **See** *also* United States v. Boswell, 23 C.M.R. 369 (C.M.A. 1957).

[115] *See* United States v. Blau, 17 C.M.R. 232, 243 (C.M.A. 1964); Vowell, *supra* note **64,** at 44-47.

[116] *See* Vowell, ***supra*** note 64, at 58-61.

dence in aggravation remained limited to evidence related to the offense, and not the offender.[117] The reluctance to relax the rules for the government extended into posttrial matters in United States *W. Hill*,[118] where the COMA condemned the government practice of gathering evidence of the accused's background for the convening authority to consider through posttrial interviews of soldiers convicted by a court-martial.

As previously noted, the goal of sentencing after 1917 gradually began to focus on individualized sentences and rehabilitation of the offender as opposed to retribution for the offense and general deterrence. In United States *v. Burfield*,[119] the COMA ordered a new sentencing hearing when the trial judge refused to allow a psychiatrist to testify for the defense that it was unlikely that the accused would repeat his offense. The COMA held that this was precisely the type of evidence that the sentencing body should consider.[120] This emphasis on individualized sentences and rehabilitation reached its zenith in a short-lived opinion from Judge Fletcher in United States *v. Mosely*.[121] In Mosely, Judge Fletcher went so far as to find that general deterrence was not a proper matter for consideration during sentencing. Fortunately for the government, Mosely rarely was enforced and ultimately was overruled in United States *v. Lania*.[122]

The 1981 amendments to the 1969 Manual *for* Courts-Martial (1969 Manual), and the emergence of Chief Judge Robinson Everett on the COMA vastly improved the government's position with respect to sentencing. In United States *v. Vickers*,[123] the COMA affirmed the Navy-Marine Court of Military Review's (NMCMR) decision reversing the fifty-year-old practice that prohibited evidence in aggravation when an accused pleaded guilty. The COMA recognized that certain evidence—such as rape trauma syndrome—is highly relevant to determining the appropriate sentence. The 1969 Manual

---

[117] *See* United States v. Billingsley, 20 C.M.R. 917, 919 (A.F.B.R. 1955).

[118] 4 M.J. 33 (C.M.A. 1977). The chief criticism of the posttrial interview (at one time a widespread practice developed to secure as much background information as possible on an accused, to assist the convening authority in determining the propriety of clemency) was that the sentencing body should have had the opportunity to review the information that the interview revealed about the accused. Instead, this information was reserved for the exclusive consideration of the convening authority in the posttrial clemency review. **Id.** at 37 n.18. *See infra* notes 291-301 and accompanying text (discussing undue reliance on the convening authority and appellate courts to correct inappropriate sentences). In *Hill*, the COMA also urged Congress to adopt some type of presentence report that would be given to the sentencing body. Congress never has adopted this suggestion.

[119] 46 C.M.R. 321 (C.M.A. 1973).

[120] *Id.* at 322.

[121] 1 M.J. 350 (C.M.A. 1976).

[122] 9 M.J. 100 (C.M.A. 1980).

[123] 10 M.J. 839 (N.M.C.M.R. 1981), *aff'd* 13 M.J. 403 (C.M.A. 1982).

was revised to allow the military judge to relax the rules of evidence for the government, albeit only during rebuttal of defense evidence.[124] In *United States* v. *Mack*,[125] Chief Judge Everett expanded the admissibility of records of nonjudicial punishment. Although he was convinced in *Mack* that members could properly evaluate the weight to be given records of nonjudicial punishment, Chief Judge Everett later concurred in Judge Fletcher's opinion in *United States v.* Boles[126] that not all evidence in an accused's military records was admissable, essentially because members cannot be trusted to properly use this type of information.[127]

The intent behind the sentencing changes in the **1984** *Manual for Courts-Martial* **(1984** *Manual)* was to remove control of the proceedings from the hands of the defense.[128] The **1984** *Manual* greatly increased the amount of evidence the government could offer on sentencing during its case-in-chief. The government now could offer opinion evidence regarding the accused's rehabilitation potential regardless of whether or not the accused previously had opened the door.[129] However, all was not lost for the defense. Specific acts still were limited to cross-examination.[130] Aggravation evidence relating to the defendant was limited to rebuttal.131 Only matters related to the offense—victim impact, and adverse effects on the mission, discipline, or the command—were admissable.[132] For the first time the members were allowed to consider the defendant's guilty plea.[133] Finally, the burden of posttrial review was switched from the government (staff judge advocate) to the defense.[134]

---

[124] Vowell, *supra* note *64,* at 69 (citing 1969 MANUAL, para. 75d, as amended by Executive Order 12315, 3 C.F.R. 163(1982)).

[125] 9 M.J. 300 (C.M.A. 1980).

[126] 11 M.J. 195,201 (C.M.A. 1981).

[127] *Id.* at 198n.5. The information suppressed was a letter of reprimand.

[128] Prior to 1984, the accused and his counsel practically controlled the amount and type of evidence about the accused that could be offered during sentencing by their decision whether or not to offer any evidence in extenuation and mitigation. See *supra* note 45 and accompanying text.

[129] MCM, *supra* note 13, R.C.M. 1001(b)(5). In retrospect, this may have been a box better left unopened, considering the amount of appellate litigation generated by rehabilitation potential evidence. The failure of Congress and the President to provide any concrete guidance on how rehabilitation potential should fit into the sentencing equation caused this. See *infra* notes 275-78 and accompanying text (discussing the current state of confusion regarding rehabilitation potential evidence).

[130] *Id.*

[131] *Id.* R.C.M. 1001(d).

[132] *Id.* R.C.M. 1001(b)(4) discussion.

[133] *Id.* R.C.M. 1001(b)(5). But again, Congress provided no specific guidance as to how the accused's guilty plea should affect a sentence.

[134] *See* UCMJ art. 60 (1984); MCM, *supra* note 13, R.C.M. 1106. See *generally* Vowell, supra note 64, at 85.

This brief history demonstrates how sentencing procedures in the military have changed over the years.[135] In its infancy, the purpose of military sentencing was retribution for the offense and the procedures reflected this purpose by limiting the evidence on sentencing to that which was presented on the merits. Current sentencing procedures are concerned with far more than just retribution. They have been modified to provide greater access to information about the offense and the offender to result in a sentence that takes into account all of the additional purposes behind military sentencing. But each increase in permissible sentencing evidence is accompanied by a related increase in risk that the members will not know how to factor this evidence into their sentencing deliberations, Sentencing is no longer the one-dimensional process it used to be. It is a very complicated process that requires training and experience in both the law and the principles of sentencing—training and experience that members sorely lack, and military judges possess.

IV. Comparison of Federal and State Sentencing Procedures

Although numerous theories exist on the origin of the jury system, one common belief is that it was brought to England in 1066 during the Norman invasion.[136] The first juries were actually the precursor to our modern grand jury.[137] The trials themselves were conducted not in a court of law, but by ordeal,[138] wager of law,[139] or

---

[135] *See* Vowell, *supra* note 64, at 4.

[136] Webster, *supra* note 2, at 222.

[137] King Henry II passed a law in 1166 that decreed no man would be brought to trial unless found guilty by "twelve knights, good and true." *Id.*

[138] "Four kinds of ordeal were in common use in England. The Ordeal by Fire required the accused to carry a piece of hot iron for nine paces. The hand was then wrapped for three days. At the end of the third day the bandage was removed; if the hand had festered, it was determined that the man was guilty because it had previously been requested that God keep an innocent man's hand clean of infection. The Ordeal by Hot Water was similar to ordeal by fire in that the same routine was followed, except that the accused was required to remove a stone from the bottom of a vessel of boiling water. In the Ordeal of the Corsnade, the priest gave to the accused a one-ounce morsel of bread or cheese which had been charged to stick in the man's throat if he were guilty. When the Ordeal was by Cold Water, the accused was bound and lowered into a pool of water which the priest had consecrated and adjured to receive the innocent but to reject the guilty. Therefore, if the man floated he was guilty; if he sank he was innocent." *See* WINDEYER, LEGAL HISTORY 14, 15 (2d rev. ed. 1957).

[139] *Id.* at 16 n.8.

> In Compurgation or Wager at Law the accused swore that he was not guilty and he then called several of his neighbors to state on their oath that the accused party's oath was clean, i.e. that he was the sort of person who would not tell a lie under oath. Although somewhat difficult to understand by modern standards, at this time in history a man would hesitate to swear a false oath. His neighbors, if not convinced of his

battle.[140] Although there was certainly little need for sentencing after trials of this nature, trials eventually moved into the courtroom, and the English common law developed the practice of having the trial judge decide the sentence in criminal trials.[141]

In colonial America, drafters of federal and state constitutions were determined to protect the right of an accused to be tried by a jury of his peers.[142] Although the Constitution and Bill of Rights specifically provided for the right to trial by jury, they did not provide a constitutional right to be punished by a jury of one's peers.[143] The sole purpose for providing the right to trial by jury was to protect the accused from unwarranted punishment.[144] But once found guilty by a jury of one's peers, the only constitutional protection regarding the degree of punishment is that it not be "cruel and unusual."[145]

The vast majority of states have adopted the practice of mandatory judge sentencing. This was not always the case, as several states preferred jury sentencing. Prior to 1967, jury sentencing, in one form or another, was practiced in thirteen states.[146] This number has declined to only eight states,[147] out of a growing recognition that the

---

innocence, might fear to support this oath because of their belief that the wrath of God would be made manifest on them and that misfortunes would follow such a false oath. Therein lay the effectiveness of Compurgation.

Id. at 12.

[140] *Id.* at 223. Trial by Battle also was a way of determining the decision of God in the quarrels of men. Parties would either fight themselves, or hire a champion to fight for them. Id. at 44-46.

[141] HANS & VIDMAR, JUDGING THE JURY 40 (1986).

[142] U.S. CONST. art. III, § 2, cl. 3 (The trial of all crimes, except in cases of impeachment, shall be by jury. . . .); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."). With respect to state constitutions, see HANS & VIDMAR, *supra* note 141, at 31.

[143] *See* Reese, supra note 10, at 327 (citing McMillan v. Pennsylvania, 477 U.S. 79 (1986)) (no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact); James v. Twomey, 466 F.2d 718, 721 (7th Cir. 1972) (no federally guaranteed right to jury determination of sentence); Payne v. Nash, 327 F.2d 197, 200 (8th Cir. 1964) (nothing in fourteenth amendment gives right to have jury assess punishment)).

[144] John Poulos, *Liability Rules, Sentencing Factors and the Sixth Amendment Right to a Jury Pial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 669 (1990) (Sixth Amendment achieves this goal by interposing the common sense judgment of a group of laymen between the accused and his accuser, and by invoking the community participation and shared responsibility that results from that group's determination that the defendant is liable for punishment at the hands of the government).

[145] U.S. CONST. amend. VIII.

[146] *See* E.A.L., *supra* note 5, at 969 n.2. The 13 states that used or continue to use juries for sentencing are: Virginia, Alabama, Arkansas, Georgia, Indiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Tennessee, Texas, and Kentucky.

[147] *See* Reese, *supra* note 10, at 328-29. The eight states still using juries in some form for sentencing are Mississippi, Arkansas, Missouri, Kentucky, Texas, Oklahoma, Tennessee, and Virginia.

circumstances that may have justified jury sentencing at one time no longer exist.[148]

Tremendous diversity exists among these eight states regarding both the amount of discretion afforded the jury, and the circumstances under which the jury will determine the sentence. In Mississippi, for example, the jury may determine punishment for only two crimes—carnal knowledge and rape. If the defendant pleads guilty to these offenses, the trial judge decides the sentence.[149] In Kentucky, the jury decides the sentence in cases when the jury determines guilt, unless the punishment is fixed by the law.[150]

In Arkansas, the jury determines the sentence unless: (1) the defendant pleads guilty; (2) the defendant elects trial by judge alone; (3) the jury fails to agree on punishment; or **(4)** the prosecution and defense agree that the judge will fix the sentence.[151]

The practice in Missouri is for the judge to instruct the jury on the range of permissible punishment, but if the defendant requests in writing that a judge impose a sentence, or if the defendant is a prior, persistent, or dangerous offender, then the judge assesses punishment. The judge also will assess punishment if the jury cannot agree on a sentence. Even in those cases where the jury deliberates on a sentence, the judge ultimately decides the actual sentence, with the limitation that he or she cannot exceed the sentence adjudged by the jury unless their sentence is below the mandatory minimum.[152]

In Oklahoma, the defendant must make a specific request to have the jury decide his or her punishment. The Oklahoma code sets limits within which the adjudged sentence must fall. If the jury fails to agree on the sentence, then the judge will determine the sentence for them.[153]

In Texas, the judge is charged with determining the sentence unless the offense is one for which the jury can recommend probation, or the defendant requests in writing, before *voir dire,* that the jury decide the sentence. When the jury does decide the sentence, the Texas code provides detailed guidance on the instructions to be given the members regarding parole and good time.[154]

---

[148] *See* Report, *supra* note 9, at 79. Some of the early reasons for jury sentencing were "colonial distrust of judges appointed by the crown (and later federalist-dominated courts), the frontier belief that the people should decide for themselves, and the general lack of difference in either training or competence between the judge and the jury throughout much of the nineteenth century." *Id.*

[149] MISS. CODE ANN. § 97-3-67; 97-3-71 (1988).

[150] KY. R. CRIM. PROC. 9.84(1) (1992).

[151] ARK. CODE ANN. § 5-4-103 (Michie 1992).

[152] MO. ANN. STAT. § 557.036 (Vernon 1991).

[153] OKLA. STAT. A". tit. 22, $926,927 (West 1991).

[154] TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (West 1990).

Tennessee, conversely, has the jury decide the maximum and minimum sentence range within which the judge must determine the actual sentence. Except for the offenses of second degree murder, rape, carnal knowledge, assault and battery with intent to commit carnal knowledge, armed robbery, kidnapping for ransom, or any class X felony, the jury "shall affix a determinate sentence."[155]

The Commonwealth of Virginia is the lone holdout remaining most true to jury sentencing.[156] Yet even in Virginia, jury sentencing is limited to only those cases tried on the merits before a jury. The right to trial by judge alone requires the consent of the trial judge and the prosecutor.[157] In cases decided by a jury, the Virginia code sets limits within which the jury's sentence must fall. The jury's sentence is subject to the review of the trial judge who has the power to suspend the sentence.[158] Legal scholars have criticized the Virginia procedure for years;[159] to avoid sentencing by juries that have demonstrated a tendency to impose severe sentences, criminal defendants are systematically forced to forfeit their right to a jury trial.[160]

V. Consequences of Current Sentencing Procedures

It is necessary to understand the proper purposes and goals of sentencing before one can evaluate the success or failure of current military sentencing procedures. Should the goal of military sentencing be uniform sentences, lenient sentences, sentences that maintain discipline, or sentences that focus on the offender as opposed to the offense? The only constitutional restriction with respect to criminal punishments is that they not be "cruel and unusual."[161] The *Manual*'s only concern is that the sentence be "appropriate."[162]

---

[155] TENN. CODE ANN. $40-20-106 (1982).

[156] VA. CODE ANN. § 19.2-295 (Michie 1992).

[157] *See* Roman v. Parrish, 328 F. Supp. 882 (E.D. Va. 1971).

[158] *Vines v. Murray*, 553 F.2d 342 (4th Cir.), cert. *denied* 434 U.S. 851 (1977). One could compare this suspension power to the convening authority's clemency power. However, the trial judge is an observer at the trial as opposed to the convening authority who is reviewing the case on paper.

[159] *See generally* E.A.L., *supra* note 5.

[160] *Id. See also Few are Willing to Gamble on Jury*, THE DAILY PROGRESS (Charlottesville, Va.), Nov. 17, 1992, at 1. This article noted that within the Charlottesville, Virginia, area, the vast majority of the people charged with crimes are not willing to gamble on a jury, although juries present a better chance for acquittal. Jury sentences in drug cases were five times more severe than those imposed by judges. Sentences for burglaries and violent felonies were over twice as severe as those from judges. As a result of these manifest differences, 802 of the 831 defendants who pleaded guilty between 1989 and 1991, had their sentence decided by the trial judge, and 155 of the 162 contested trials were tried before a judge without a jury.

[161] U.S. CONST. amend. VIII; UCMJ art. 55 (1984).

[162] MCM, supra note 13, R.C.M. 1006(e)(3) "Instructions on sentence shall

One view is that the predominant concern in sentencing should be its effect on discipline and the military's ability to accomplish its mission.[163] An alternate view is that the sentence of a court-martial is not an expression of the will of the command, but a judgment of a court of the United States that must, therefore, provide fairness and due process to the accused.[164] The resolution of these competing viewpoints lies somewhere in between.[165]

To determine the full ramifications of the military's sentencing procedures, one should consider their impact on all of the affected parties. Thus, the military's sentencing procedures will be reviewed from the perspective of the accused, the government-trial counsel, commanders-court members, military judges, and the general public.[166]

A. The Accused

A soldier pending court-martial benefits from the current sentencing procedures in several ways. Most importantly, the accused has a choice between sentencing by members and sentencing by judge alone. Depending on the circumstances of the case and the advice of counsel, the accused normally will select the forum most likely to adjudge the most lenient sentence.[167] The soldiers' morale is improved when they know they have a choice should they ever find

---

include . . . a statement informing the members that they are solely responsible for selecting an appropriate sentence. . . .''

[163] *See* Vowell, *supra* note 64, at 6.

[164] *Id.* at 7 n.20 (citing Minority Report of Mr. Sterritt).

[165] *See* BENCHBOOK, *supra* note 21, para. 2-39 ("you should select a sentence which best serves the ends of good order and discipline in the military, the needs of the accused, and the welfare of society").

[166] The opinion of the general public is critical to any assessment of our military justice system. *See* Cox, *supra* note 61, at 2 ("Our system of military justice cannot be viewed solely from the vantage point of the military; it must also be viewed from the perspective of the people and the politicians.").

[167] In 1983, 60% of the defense counsel surveyed stated that decisions to request trial by military judge alone are based primarily on sentencing considerations, 10% indicated that such decisions are based on findings considerations, and 28% indicated that there was no difference. Survey, *supra* note 10, at 26. Specific responses from defense counsel surveyed in 1993, regarding the advice they give clients on forum selection, included the following: "it's better to go with a new panel as opposed to a 'hardened' one"; "if you have a sympathetic victim or any other particularly aggravating factor, stay away from members"; "the military judge is less swayed by emotion and argument of counsel"; "if the accused has a good case in extenuation and mitigation go with members"; "if you have a pretrial agreement (safety net) you may as well take a risk of beating the deal with a panel, because the judge is more likely to adjudge a sentence within a narrower range than will a panel"; "a panel for sentencing without a pretrial agreement is a 'crapshoot"'; if it's a military offense—avoid members"; "the accused may want to waive members in order to get a better pretrial agreement." Thesis Survey, *supra* note 4. *See also* John E. Baker & William L. Wallis, *Predicting Courts-Martial Results: Choosing the Right Forum*, ARMY LAW., Sept. 1985, at 71.

themselves before a courts-martial. Giving soldiers this option also creates an appearance of fairness with the general public.[168] The right to be tried and sentenced by members also provides the accused a valuable bargaining chip during pretrial negotiations with the convening authority.[169]

The downside for the accused is that the military judge may deny the request for trial by military judge alone.[170] Another significant drawback occurs when the accused perceives that members will sentence more harshly than a judge. To avoid being sentenced by these members, the accused must forfeit his right to be tried by them on the merits.[171] Although the perception exists among those involved in military justice that the odds favor contesting a case before members,[172] it is not uncommon for defense counsel to encourage defendants to request trial before military judge alone, based on the more favorable sentencing prospects presented.[173] Moreover, because two out of every three courts-martial are tried by

---

[168] Report, *supra* note 9, at 27. During hearings, the American Civil Liberties Union offered the following comment: "The public's perception that the military justice system is fair and their continued confidence in the system are necessary in order to achieve general public support for the armed forces. Public perception regarding the fairness of the system is enhanced when service members have options such as that of selecting their sentencing authority." See *also* Survey, supra note 10, at 21. Trial and defense counsel agree that elimination of the option would appear to deprive an accused of a substantial right. Although most parties agree that giving an accused the option to select the sentencing forum is good, none of the parties surveyed in 1983 approved of giving the accused even greater choices. ***Id.*** Although an accused having options is perceived positively, a more equitable and efficient means for improving the public's perception of military justice would be to completely remove court members from the sentencing process. See *infra* notes 320-21 and accompanying text.

[169] MCM, supra note 13, R.C.M. 705(c)(2)(E). Thirty-four of fifty-four defense counsel stated that they offered to waive members for findings or sentence in hopes of a better pretrial agreement for their client. Six of eighteen prisoners who pleaded guilty responded that they specifically waived members for sentencing to get a better deal. Thesis Survey, supra note 4.

[170] MCM, supra, note 13, R.C.M. 705(c)(2)(E). See United States v. Stewart, 2 M.J. 423, 426 (C.M.A. 1975).

[171] *See* United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988) (appellant nonetheless felt so constrained to avoid court-martial with members that he requested trial by the same judge who had denied appellant's earlier challenge of that judge—arguing that the judge could not be impartial because the judge's daughter was a good friend of the victim of the alleged indecent acts. The COMA noted that appellant's instincts were on the mark as the members eventually sentenced appellant to the literal maximum punishment allowed by law.). ***Id.***

Twelve of seventeen prisoners who pleaded not guilty before a military judge did so to avoid member sentencing. Only four of the seventeen regretted this decision, compared to fourteen of the twenty-nine who regretted their decision to be tried and sentenced by members. Thesis Survey, supra note 4.

[172] *See* supra notes 31-32 and accompanying text.

[173] Thirteen of fifty-four defense counsel surveyed volunteered that they often give this type of advice to their clients. Thesis Survey, ***supra*** note **4.**

military judge alone,[174] arguably the choice of being sentenced by members is not that important to the accused.[175]

B. *Government—Trial Counsel*

Retaining the current sentencing procedure that gives the accused the option to be sentenced by court members—although perceived as advantageous—offers no significant benefits to the government.

1. Administrative Burden.—Sentencing by members creates an enormous burden on the government in the form of both the administrative difficulties associated with securing the attendance of members at trial and the corresponding disruption to military training caused by their absence from regular duties.[176] The impetus behind the change to the 1969 Manual—giving the accused the option to be tried by military judge alone—was to reduce the administrative burdens on the government. Eliminating court members from sentencing may extend these manpower savings even further.[177]

2. Forum Shopping.—Giving an accused the option to be tried by judge or members inevitably leads to "forum shopping." Soldiers facing trial undoubtedly will select members in those cases in which they feel they will receive a more lenient sentence.[178] Former Chief Judge Cedarburg, United States Coast Guard Court of Military

---

[174] *See infra* Appendix A (chart, "General Courts-Martial Tried Before a Military Judge Alone During the Previous Five Years").

[175] The percentage of judge alone cases could be even higher, as many of the soldiers requesting trial by members are doing so because they want members to determine their guilt or innocence, not necessarily because they prefer to be sentenced by them. This is supported by recent statistics on guilty pleas, which demonstrate a steady 80% preference for judge alone sentencing over the last five years. These numbers may be influenced, however, by some jurisdictions' requirement that an accused waive the right to members on sentencing prior to entering into a pretrial agreement with the convening authority. See *supra* notes **168-73** and accompanying text (discussing waiver of sentencing by members during pretrial negotiations). *See infra* Appendix B (chart, "Guilty Pleas").

[176] Report, *supra* note **9,** at **28.** "Military judge alone sentencing will relieve commanders of the need to expend valuable line officer assets for this purpose, which is particularly critical in wartime."

[177] *See* Ervin, *supra* note **106,** at **92-93.** "The armed services, which vigorously supported this provision [option to be tried by military judge alone], anticipate that this new procedure will result in a great reduction in both the time and manpower normally expended in trials by court-martial." *See also* United States v. Butler, **14** M.J. **72, 73** (C.M.A. **1982)** (cost efficiencies should encourage bench trials when appropriate and properly requested by an accused). *But see infra* note **339** and accompanying text.

[178] Report, *supra* note 9, at **28.** "Continuing a service member's forum option through the sentencing phase enables an accused to 'forum shop' for the court-martial composition which is likely to award the most lenient sentence."

Review, offered the following comment during his testimony before the 1983 Advisory Committee: "I know that there are judges who hammer and there are other judges who are lenient; but I also know that the hammers under the present system don't get a chance to sentence because they [the accused] don't go before them. They choose the trial by members."[179]

That military judges will become too powerful or too heavy handed with their sentences if we eliminate court member sentencing is unlikely. Military judges are trained jurists who can be entrusted to sentence soldiers fairly. Nevertheless, if military judges begin to demonstrate a pervasive inability to adjudge proper sentences, the more appropriate solution would be consideration of some form of sentencing guidelines, as opposed to the current system of relying on untrained court members to serve as a system of checks and balances against judges who impose harsh sentences.

3. Disparate *Sentences.*—Member sentencing also lends itself to much more disparate results, on both the high and low ends of the sentencing spectrum.[180] From the government's perspective, this can be either good or bad—assuming a severe sentence is considered "good" for the government, and a lenient sentence is considered "bad." But not all disparate results are an indication of unfairness to the accused.[181] Several survey responses indicated that sentence disparity may be justified by different commands placing focus on different aspects of a crime. Such disparity also may be justified by a crime having a different effect on different units, depending on the unit's mission—Training and Doctrine (TRADOC) posts may be more severe on fraternization and sexual offenses than Forces Command (FORSCOM) installations; 82d Airborne Division "ready brigades" are inclined to sentence more severely than garrison units stationed at XVIII Airborne Corps at Fort Bragg, North Carolina.

Excessive results—be they high or low—are detrimental to the government because they effect soldiers' perceptions of the overall fairness of the system. If the sentence is unduly harsh, soldiers—as well as the general public—will consider it an ineffective system

---

[179] *Id.* **at 48 (citing testimony of Chief Judge Cedarburg, United States Coast Guard Court of Military Review).**

[180] **Survey,** *supra* **note 10, at 20. When asked how often court member sentences and military judge sentences were inappropriately harsh or lenient, convening authorities generally rated members and judges evenly, although Air Force convening authorities felt that members gave inappropriate sentences slightly more often than did judges. All lawyer groups, particularly judges, felt that members gave inappropriate sentences more often than judges, with defense counsel coming closest to calling them equal in this area.**

[181] **Thesis Survey,** *supra* **note 4.**

corrupted by command influence.[182] Alternatively, an unduly lenient sentence—such as retention of a barracks thief—can have a devastating effect on unit morale and discipline. Unusually lenient sentences pose the greatest danger to military discipline because no posttrial remedy is available to correct the injustice.[183] If the sentencing body adjudges an unduly harsh sentence, however, the convening authority, or courts of military review can reduce an accused's sentence.[184] Although it is possible for a military judge to announce an irrationally low sentence, statistics indicate that judges, as opposed to members, are far less likely to adjudge aberrant sentences on either the high or low end of the spectrum.[185]

4. *Unpredictable* Results.—Parties in both surveys overwhelmingly agreed that court members are more unpredictable with respect to sentencing. Judges, be they more harsh or lenient,[186] have a much better history of adjudging sentences within a certain range of reason. Some defense counsel do not like this tendency of military judges to be more uniform during sentencing, because they lose the opportunity to gain their client a lenient sentence.[187] From the government's perspective, however, it is more advantageous for the military to have a system that is inclined to sentence more uniformly than one that promotes unpredictable results.

5. Appellate Error: —Member sentencing creates a much greater risk of appellate error.[188] In the Advisory Commission to the Military Justice Act of 1983, critics of judge alone sentencing felt that appel-

---

[182] *See* Grove, *supra* note 3, at 29. This is especially true when an unusually disproportionate sentence gets widespread attention. Civilians tend to be more offended by excessive sentences like that handed down to Air Force Second Lieutenant Joann Newak, whose sentence for drug offense and homosexual sodomy included seven years confinement. Id. (citing McCarthy, *Justice for a Lieutenant*, WASH. POST, Jan. 9, 1983, at M.4; United States v. Newak, 15 M.J. 541 (A.F.C.M.R.), *rev'd*, 24 M.J. 238 (C.M.A. 1987).

[183] MCM, supra note 13, R.C.M. 1107(d)(1) (convening or higher authority may not increase punishment imposed by a court-martial).

[184] *Id.*; *see also* UCMJ art. 66 (1984).

[185] All groups overwhelmingly agreed that judges sentence more consistently in similar cases. Survey, *supra* note 10, at 22.

[186] Opinions on whether judges were harsh or lenient differed greatly among all parties surveyed—yet all agreed that judges were not *unduly* harsh or lenient. *See generally* Thesis Survey, *supra* note 4; Survey, *supra* note 10.

[187] Thesis survey responses from defense counsel confirmed the belief that their clients stood a greater chance of receiving either a more lenient or more harsh sentence with court members. Thesis Survey, *supra* note 4.

[188] From fiscal year 1988 through fiscal year 1992, the United States Army Court of Military Review (ACMR) reassessed sentences in 2.6% (120 of 4,483) of all cases involving members for sentencing because of sentencing errors. Comparatively, the ACMR reassessed sentences in only 1.5%(189 of 12,492) of cases with military judges determining the sentence due to sentencing errors. Statistics provided by the Clerk of Court, United States Army Court of Military Review, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

late error was not a significant concern. It was their impression that few complex legal issues were addressed during sentencing, so only a minimal number of legal errors would be prevented. They also believed that most sentencing errors could be cured through sentence reassessment by a court of military review.[189] One need only look to the index of any recent Military Justice Reporter under "rehabilitation potential" or "uncharged misconduct" to discover the tremendous volume of appellate litigation generated by errors during sentencing.[190] Moreover, having courts of military review and convening authorities provide relief for sentencing errors is a poor excuse for maintaining a sentencing forum option that is far more prone to making such errors.[191]

6. ***Safeguards Against*** *Command* ***Influence.***—To preserve the military tradition of member sentencing, and at the same time protect soldiers from being sentenced by panel members who may be unlawfully influenced by the convening authority that selected them as well as by commanders,[192] Congress and the President have had to continually monitor and update procedural safeguards to reduce the possibilities of unlawful command influence.

The intent of Article 25, UCMJ, is to ensure that convening authorities select only the "best qualified" personnel to sit as court members. It also requires that the court members be from a unit different from the accused[193] and senior in grade.[194] The court-martial panel often is referred to as a "blue ribbon panel,"[195] hand picked by the convening authority. But the high standards of Article 25 are not always achieved. Sometimes convening authorities intentionally or unintentionally select members on the basis of their expendability from regular duties.[196] Counsel who have tried cases

---

[189] Report, *supra* note 9, at 47 (quoting testimony of Brigadier General Moore, United States Marine Corps (Retired)).

[190] *E.g.*, United States v. Oquendo, 35 M.J. 24 (C.M.A. 1992) (improper testimony on rehabilitation potential from accused's battalion commander and command sergeant major not harmless because their views would logically be afforded serious consideration by members); United States v. Stinson, 34 M.J. 233 (C.M.A. 1992); United States v. Rice, 33 M.J. 451 (C.M.A. 1991); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989).

[191] *See infra* notes 291-301 and accompanying text (discussing undue reliance on convening authority and courts of review to correct inappropriate sentences).

[192] *See* UCMJ arts. 25, 37, 98 (1984).

[193] UCMJ art. 25(c) (1984).

[194] UCMJ art. 25(d) (1984).

[195] The term "blue ribbon panel" initially was mentioned during the Senate Hearings on the 1951 Manual. See Report, supra note 9, at 67 (citing Hearings on H.R. 5957, Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 94 (1949)).

[196] The Advisory Commission's Survey determined the following:

Several questions tested perceptions of the 'quality' of court members,

in busy jurisdictions are well aware of how often members are excused for field training exercises and other important military duties. There are virtually no restrictions on the convening authority's discretion to excuse members[197]—the convening authority may delegate this authority to the staff judge advocate, legal officer, or principal assistant.[198]

The disparity in the amount of time a convening authority spends selecting court members is another area of concern. The amount ranged from thirty minutes to several days.[199] Those who spent little time selecting members often commented that they rely on their subordinates to prepare a list of nominees. ***United States v. Hilow***[200] demonstrated the risks associated with this practice. Although the convening authority in Hilow properly applied Article 25 criteria, his actions did not cure the taint of a misguided assistant adjutant who prepared the list of nominees with what he perceived to be people who were "hard-liners" on discipline.

Article 37, **UCMJ,** is designed to prevent commanders from reprimanding court-martial personnel or otherwise trying to influ-

---

> the importance of court member duty, and the value of court duty to the court members. All groups believed that the 'best qualified' personnel were sometimes or usually selected for duty, although the lawyers who actually see them in court (military judges, trial counsel, and defense counsel) had a slightly lower opinion of members' qualifications. Convening authorities and staff judge advocates generally thought that members were 'seldom' or 'sometimes' selected based primarily on their relative expendability. The other groups thought that expendability played a slightly greater role in member selection.

Survey, ***supra*** note 10, at 21.

[197] **UCMJ** art. 25(e) (1984). In United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988), Judge Cox noted that this power over the selection process gives the government the "functional equivalent of an unlimited number of peremptory challenges." Id. at 478.

[198] ***See*** UCMJ art. 25(e); ***see also*** MCM, ***supra*** note 13, R.C.M. 505(c)(1).

[199] Of the forty-seven convening authorities surveyed, twelve spent less than one hour, ten spent about one hour, eleven spent one to two hours, seven spent longer than two hours, and seven spent longer than one day. One convening authority commented, "I don't have time to choose, ***so*** I rely on the people I know that are on the list." Another felt that the two hours he spent was "an inordinate amount of time to be spent on court-member selection." Thesis Survey, ***supra*** note **4.** In a 1977 study, the Comptroller General interviewed thirteen convening authorities from the four services. The study found that all convening authorities used different criteria, such **as** position, type of experience, grade, and availability to exclude persons from consideration. Some personally select jurors while others selected from nominations by subordinates. Some had not discussed selection criteria with subordinates who nominate jurors. The Comptroller General ultimately recommended that article 25, UCMJ be amended to require random selection of court members. This recommendation **was** not adopted. ***See Military Jury System Needs Safeguards Found in Civilian Federal Courts,*** Comp. Gen. Rep. B-186183 at 16-18 (Jun. 6, 1977).

[200] 32 M.J. 439 (C.M.A. 1991). ***See also*** United States v. McCall, 26 M.J. 804 (A.C.M.R. 1988) (the ACMR held that "it sounds like somebody has already selected a list of people to take in to the convening authority for him just to kind of rubberstamp.").

ence court members or convening authorities with respect to judicial activities.[201] Article 98, UCMJ,[202] is designed to enforce the provisions of Articles **25** and **37.** Article 98 provides punitive sanctions for anyone convicted of unlawful command influence. To date, however, there is not one reported case of a conviction under this article. Nevertheless, appellate courts continue to report cases of unlawful command influence.[203] Eliminating members on sentencing will significantly reduce concerns associated with unlawful command influence.204

7. *Evidentiary* ***Safeguards.***—One of the military judge's responsibilities is to consider evidence, on motions and objections, that later may be ruled inadmissable. Judges are trusted to disregard such evidence and ultimately render a fair and impartial decision based only on admissable evidence.[205] Because court members are untrained in the law, however, the Military Rules of Evidence severely limit the evidence members may be exposed to. Consequently, the government's ability to offer substantial evidence about the accused or the offense often is frustrated and the resultant sentence is based on little or no information about the accused or the offense.[206]

---

[201] UCMJ art. **37 (1984)** provides: "No authority convening a . . . court-martial nor any other commanding officer may censure, reprimand, or admonish the court or any member, military judge or counsel thereof . . . No person subject to this chapter may attempt to coerce or by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof. . ."

[202] UCMJ art. **98 (1984)** provides: "Any person subject to this chapter who . . . knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused, shall be punished as a court-martial may direct."

[203] *E.g.*, United States v. Redman, **33** M.J. **679** (A.C.M.R. **1991)** (convening authority selects new panel because dissatisfied with court-martial results of current panel); United States v. Jameson, **33** M.J. **669** (N.M.C.M.R. 1991), United States v. Jones, **33** M.J. **1040** (N.M.C.M.R. **1991).** In both *Jameson* and ***Jones,*** witnesses who provided favorable testimony for homosexual defendants were relieved from leadership positions.

[204] The majority of appellate cases addressing unlawful command influence involve command influence related to sentencing as opposed to the merits. *E.g.*, United States v. Thomas, **22** M.J. **388** (C.M.A. **1986);** United States v. Treakle, 18 M.J. **646** (A.C.M.R. **1984)** (which involved commanders discouraging soldiers from testifying for defendants during sentencing). ***See also*** *Jameson,* **33** M.J. at **699** and *Jones,* **33** M.J. at **1040.** In guilty pleas, command influence always is directed at sentencing.

[205] United States v. Oakley, **33** M.J. **27** (C.M.A. **1991)** (exposure to pleas and motions did not require recusal of the military judge); United States v. Stinson, **34** M.J. **233** (C.M.A. **1992)** (in absence of evidence to the contrary, COMA assumed military judge properly evaluated evidence in accordance with M.R.E. **403** and **702);** United States v. Oulette, **34** M.J. **798** (N.M.C.M.R. **1991)** (military judge's assertion of impartiality afforded great weight).

[206] Although R.C.M. 1001(b)(4) permits the government to present evidence in aggravation directly related to the offense, the government is extremely limited in its ability to offer evidence about the accused. ***See*** Magers, ***supra*** note 8, at **59.**

Moreover, it is the accused and not the government who controls the amount and type of evidence that the government may introduce regarding the accused's background and character. If the accused has a bad record, he or she can keep this from the members by not "opening the door" for the government by introducing any good character evidence. Conversely, if he or she has a good background, the defense can present a great variety of evidence in extenuation and mitigation.

In *United States v. Boles*,[207] the COMA observed that the military's procedural rules for sentencing were not as liberal as those in the federal district courts. The COMA recognized that this variance may be the result of court members adjudging sentences at courts-martial as opposed to judges in the federal system. The susceptibility of court members requires the military judge to assume a proactive role in protecting members from evidence that may "unduly arouse the members' hostility or prejudice against an accused."[208]

Moreover, due to the members' inexperience in evaluating evidence, relevant evidence that is otherwise admissible on sentencing must be excluded because its prejudicial impact outweighs its probative value.[209] The task of determining relevant sentencing evidence has become so confusing that appellate court judges have taken to discouraging trial counsel from pushing the limit until "the dust settles a bit and the rules become more clear."[210]

C. Commanders-Court Members

From the command's viewpoint, member sentencing offers the

---

[207] 11 M.J. 195, 198 (C.M.A. 1981).

[208] Id. at 201. The COMA added:

> In a similar vein, it must be remembered the sentencing body in the military justice system . . . may be the lay members of a court-martial rather than a military judge. In such a system of criminal justice, the military judge must act in a manner to ensure the integrity of the court members as impartial and properly informed decision makers. Such a reality in the military justice system substantially affects the exercise of discretion by the military judge in the array of information he may permit to go before the members on the question of sentencing and in his decision to *sua sponte* instruct them concerning the permissible use of such evidence. In this light, he should be particularly sensitive to probative dangers which might arise from the admission of uncharged misconduct evidence during the sentence procedure which, though relevant or even admissible, would unduly arouse the members' hostility or prejudice against an accused.

Id. (citations omitted).

[209] MCM, *supra* note 13, MIL. R. EVID. 403. *See* United States v. Zengel, 32 M.J. 642 (C.G.C.M.R. 1991).

[210] United States v. Bennett, 28 M.J. 985, 987 (A.F.C.M.R. 1989) (Kastl, J. concurring).

following advantages:[211] (1) members provide a highly educated *blue ribbon panel* that knows the needs of the military; (2) members provide valuable community input as to what is needed for discipline; (3) member sentencing provides valuable training for young soldiers; and (4) member sentencing is a highly valued military tradition. Alternatively, member sentencing creates the following problems for commanders: (5) it disrupts unit training and mission requirements while commanders and senior noncommissioned officers are away from their normal duties; (6) members are not properly trained to perform the sentencing function because they cannot properly evaluate rehabilitation and aggravation evidence; do not know the collateral consequences of certain punishments; are prone to compromise verdicts; and are unduly influenced by emotion; and (7) it causes undue reliance on convening authorities and appellate courts to correct inappropriate sentences.

1. Court Members Are a Blue Ribbon Panel.—

> We have a habit . . . of loosely referring to a court-martial panel as the jury. . . . [I]t is not a jury; it was never designed to be a jury. . . . It was designed to be a blue ribbon panel. They were to be picked because of their expertise and their knowledge. They wanted . . . the people who were mature; the people who knew how to make decisions; the people who were aware of the military requirements. . . . [T]hey represent the decision-making level of the Army. . . . [W]e teach them something about military justice; they know the situation in the Army."[212]

That member sentencing has survived to this date is attributable to the quality and integrity of the officers and enlisted personnel who serve as members.[213] The problem with member sentencing lies not with the integrity of the members, but with asking them to perform a duty they know little if anything about.[214]

---

[211] These *perceived* advantages to 'the command' are not to be construed with the advantages to the government that are discussed later in this article. See *infra* text accompanying notes 334-39.

[212] Report, *supra* note 9, at 39 (quoting testimony of Colonel Garner, United States Army, before the Advisory Commission to the Military Justice Act of 1983).

[213] *See* Grove *supra* note 3, at 27.

[214] Charles W. Schieser & Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: the Removal of Commanders from Military Justice*, 7 TEX. TECH L. REV. 559, 565 (1976).

> Unlawful command influence exists in significant part because the present structure of American military justice permits it to exist. That structure sets up conditions which virtually insure that unlawful command influence will be present in a variety of ways . . . To attack this problem inherent in the present system of military justice is not to impugn the integrity of military commanders. Military commanders are no better and

> Nonlegal military commanders are distinctly inferior to legal personnel insofar as the technical ability needed for the proper administration of a system of criminaljustice is concerned, just as they are inferior (as are lawyers) to physicians in terms of medical knowledge. Lawyers are ill-equipped to direct air strikes against enemy targets, lead troops into battle, or engage in any of the myriad other functions. . . . Military commanders, in like fashion, are not trained to perform brain surgery on military patients in military hospitals. And military commanders are not professionally competent to administer criminal justice.[215]

Even if we presume that the convening authority always selects the "best qualified" people to serve as court members, this still would not overcome the members' lack of training and education in the principles of sentencing.[216]

2. ***Members*** *Provide Valuable Community Input* ***Needed*** *to Determine an* Appropriate ***Sentence.***—This was the reason most commonly offered in support of maintaining court member sentencing.[217] Several commanders and staff judge advocates indicated that because court members live and work in the community affected by the offense they are better able to determine the type and amount of punishment appropriate for the particular offense. Others commented that the military judge is too far removed from the military community to understand the ramifications his or her sentence will have on discipline within the unit and the community.[218] Three of

---

> no worse, insofar as the present analysis is concerned, than any other citizens of our society; neither are they inferior, morally or ethically, to legal personnel.

Id. at 565.

[215] *Id.* Perhaps the most significant drawback to member sentencing is not that members lack the ability to perform the sentencing function, but rather that they do it so infrequently—court member panels rarely sit for more than six months—that they are unable to develop any expertise. Seen from this perspective, a more appropriate analogy to the field of medicine would be that just as a patient suffering back pain would rather be treated by a back specialist—as opposed to a general practitioner seeing his first patient with back pain—so too would an accused desire to be sentenced by the more trained and experienced military judge.

[216] This same argument applies even more so to the eight states that continue to use randomly selected jury members for sentencing. If any jury would ever be qualified to perform the sentencing function, it would be the military court-martial. The convening authority selects members by virtue of their age, experience, education, length of service, and judicial temperament, as opposed to the random selection of juries performed in the state and federal criminal justice systems.

[217] Twenty-two of forty-seven convening authorities listed this as a reason to preserve member sentencing. Twenty-five of sixty-eight staff judge advocates expressed the same opinion. Thesis Survey, *supra* note 4. Convening authorities and defense counsel surveyed in 1983 felt member sentences more fairly reflected the sense of justice in the community. Survey, *supra* note 10, at 19-20.

[218] Thesis Survey, *supra* note 4.

fifteen military judges surveyed agreed that they try to balance the sentences they adjudge against those adjudged by members in similar cases.[219] Those responding to the survey in favor of member sentencing also argue that the judgment of several members with different points of view and experiences is more likely to result in a more fair sentence than that adjudged by a military judge sitting alone.[220]

When the charged offenses involved are uniquely military—such as, absence without authority, disrespect, and failure to obey a lawful order—or have a direct impact on the military, more of an argument is made on behalf of the community input that court members bring to the sentencing process. Yet whatever advantage court members may have in such cases can be overcome by having sentencing witnesses testify regarding the impact of these offenses on the military community. Moreover, military judges will develop a greater appreciation for this impact over time—after all, they are members of the community as well. Finally, as the scope of military jurisdiction has expanded to cover more cases only tangentially related to the military solely by virtue of the offender's status as a soldier,[221] the unique perspectives that court members bring to the sentencing process have become less significant.

The original intent of Congress was that courts-martial would be courts of very limited jurisdiction over only military offenses.[222] When this was the practice, member sentencing made good sense. The court members were well suited to determine the appropriate

---

[219] *Id.* All groups surveyed in 1983, except appellate judges and Marine Corps staff judge advocates, agreed that judges are influenced not to exceed the sentences adjudged by members in similar cases so as not to discourage requests for judge alone trials. Survey, supra note 10, at 21. Major General Oaks, United States Air Force, noted, "[The sentencing authority] option in fact makes the judge's decision . . . more fair, because he knows he's being played off. If 1 know that I'm always going to sentence . . . there is a possibility that I would be less attentive to my responsibilities . . . . It is competition. . . . I just know . . . [it is] good for [judges] to realize [they don't] have absolute power all the time." Report, *supra* note 9, at 49 (quoting the testimony of MG Oaks before the Advisory Commission to the Military Justice Act of 1983).

[220] Thesis Survey, *supra* note 4 (responses from SOLO course attendees). Whatever advantage group decision making may offer is offset by the corresponding risk that members may attempt to compromise their verdict or sentence and "split the baby." See supra notes 285-87 and accompanying text (discussing compromise verdicts). Moreover, the argument that a group can make a better decision begs the question as all of the group members are untrained in the laws and principles of sentencing. That they are a group cannot overcome their lack of training to perform this very complicated task.

[221] *See* Solorio v. United States, 483 U.S. 435 (1981) (jurisdiction of courts-martial depends solely on accused's status as a member of the armed forces).

[222] *See* William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 41 n.128 (1980); *see* also Reid v. Covert, 354 U.S. 1, 23-30 (1957) (discussing jurisdiction of courts-martials).

punishment for the average private disobeying a lawful general order. But now that courts-martial have jurisdiction over practically every offense committed by a soldier, court member sentencing does not appear as sensible. The sentencing body must consider far more than the effect on the military in arriving at an appropriate sentence for a soldier who physically abuses his nephew while on leave in Texas.

Rather than attempt to fashion a system that permits members to punish military offenses and judges to punish the "generic" offenses, more consistent results will be achieved by having the military judge impose punishment for all offenses. Developing one military judge's knowledge concerning the effect crimes have on the military community is much easier than attempting to train new court members in the principles of sentencing for every new case. Military judges are members of the community and they all have extensive criminal law experience. Evidence of the specific impact a particular offense may have on a military community also can be offered by both the government and defense during the sentencing phase of the trial.[223]

Whatever advantage members may bring to the system by serving as the "conscience of the community," their influence has declined over the years for several reasons. First, the number of cases in which an accused elects to be tried and sentenced by members has decreased.[224] Second, the perception exists that members are more likely to adjudge disproportionately higher and lower sentences than are military judges.[225] As such, it would appear that member "input" is not that valuable to our system of justice in determining an appropriate sentence.[226] Finally, the ability of members to provide the community's assessment of the punishment necessary for a particular offense is now controlled indirectly by the military judge and the decisions he or she makes regarding the type and amount of evidence the members may consider during deliberations on sentencing.

3. Member Sentencing Helps Train Future Leaders.—This is one of the more common reasons offered in support of member sentencing.[227] Lieutenant General John Galvin, former Commander, VII

---

[223] MCM, *supra* note 13, R.C.M. 1001(b)(4); 1001(c).

[224] *See supra* notes 174-76 (courts-martial statistics on the number of trials by judge alone versus court members).

[225] *See* Thesis Survey, *supra* note 4; *see also* Survey, supra note 10, at 22.

[226] In a surprising response, all groups, including convening authorities, when asked whether depriving members of sentencing authority would deprive the command of important powers, said that it would not. Survey, supra note 10, at 22.

[227] Six of forty-seven convening authorities agreed that court-martial duty better prepares junior officers for leadership. Thesis Survey, supra note 4.

Corps, testifying before the Advisory Commission to the Military Justice Act of 1983, stated that "the fundamental fairness which is characteristic of the military justice system is instilled in court members and they carry that concept with them from the courtroom."[228] Colonel William W. Crouch, former Commander, 2d Armored Cavalry Regiment, felt that court-martial duty prepared members for "all kinds of leadership positions."[229]

Although development of junior leaders is an admirable goal, *training* them in a forum that must decide whether a soldier should be punitively discharged and an appropriate amount of confinement is grossly unfair to the accused. Unlike most other military training, a court-martial is at best a "live fire" exercise and, at worst, "actual combat," as far as the counsel, judge, and accused are concerned. The courtroom never was intended to be a training ground for junior officers.

Command influence issues aside, numerous appellate court decisions indicate that convening authorities often are reluctant to select junior members to serve on court-martial panels because they lack the proper age, experience, length of service, and judicial temperament.[230] Article 25, UCMJ, encourages this practice. Ultimately, most convening authorities select as members those officers and senior noncommissioned officers who already have demonstrated their decision-making and leadership abilities.[231] Junior officers are not the only ones who benefit from serving on court-martial panels. As noted by Lieutenant General Galvin, all court members carry with them from the courtroom a greater sense of the magnitude and importance of the military justice system. Yet court members need not participate in the sentencing function to gain this appreciation for the justice system. They will continue to gain the same benefits from their role in determining guilt or innocence.

4. Military Tradition. —The tradition of court member sentencing is tied to the very origins of the military court-martial.[232] Com-

---

[228] Report, supra note 9, at 37.

[229] Id.

[230] *See* United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (court-martial whose membership contained only master sergeants and sergeants major was not what Congress had in mind); United States v. James, 24 M.J. 894, 896 (A.C.M.R. 1987) (lack of lieutenants or warrant officers on panels for past year does not prove systematic exclusion); United States v. Greene, 43 C.M.R. 72, 78 (C.M.A. 1970) (panel consisting of three colonels and six lieutenant colonels gave appearance of being "handpicked" by government).

[231] *See supra* note 212 and accompanying text (court members "represent the decision making level of the Army").

[232] *See supra* note 62 and accompanying text (discussing origins of military justice).

manders are understandably reluctant to surrender control over what they perceive to be a unique need of the military community.[233] Commanders feel that it is their responsibility to establish the moral and professional tone of the unit.[234] These feelings alone, however, do not justify continuation of an antiquated sentencing practice solely to preserve an historical tradition for the sake of tradition.

The professed sincerity of the command's commitment to member sentencing is not supported by their actions. The radical change in the 1968 Military Justice Act that gave the accused the option to be tried and sentenced by military judge alone was "vigorously supported" by the armed forces.[235] Convening authorities agree that eliminating members from sentencing would not deprive the command of important powers.[236] Although some senior commanders have expressed a willingness to bear the administrative burdens of court-martial duties as an inherent part of their overall command responsibility,[237] one need only consider the frequency with which requests for excusal occur whenever a member is due to participate in a field training exercise or other important military operation. The proposal currently being evaluated by the working group to the Joint Service Committee on Military Justice, to completely eliminate court members from straight special courts-martial during combat, is indicative of how "sincere" commanders are about the professed importance of court-martial duty compared to their principle military responsibilities.[238]

---

[233] "Although a military judge might bring a fresh perspective to the sentencing procedure, there is 'that responsibility that the commander has that the judge can never assume'. . . 'that responsibility is unique for the military . . . [T]hat's why the involvement must be there."' Report, *supra* note 9, at 32 (testimony of General Robert W. Sennewald, United States Army, before the Advisory Commission to the Military Justice Act of 1983).

[234] Id.

[235] Ervin, *supra* note 106, at 92. The support was primarily because of the savings in both the time and manpower involved in trials by court-martial. *Id.*

[236] Survey, *supra* note 10, at 31. But most convening authorities and Army staff judge advocates believed that such a procedure would create the appearance—presumably among soldiers—that command authority had been diminished.

[237] Report, *supra* note 9, at 47-48.

[238] The proposal to eliminate members from straight special courts-martial was raised after Operation Desert Storm. During the operation, some judge advocates reported that defense counsel were using the right to demand trial by members to get their clients more favorable pretrial agreements. The administrative difficulties related to securing the presence of members for a special courts-martial during combat prompted some commands to agree to more favorable sentence limitations, in return for an accused waiving the right to be tried or sentenced by members, than the commands might have agreed to under different circumstances. Telephone Interview with Major Eugene Milhizer, Criminal Law Division, Office of The Judge Advocate General, (Mar. 26, 1993). For an explanation of the Joint Service Committee on Military Justice, see Criminal Law Div. Note, Amending the *Manual for Courts-Martial*, ARMY LAW., Apr. 1992, at 78, 79-80.

Furthermore, the military *tradition* of court member sentencing bears little resemblance to its original beginnings. Commencing in **1948,** with the introduction of enlisted members on the panel, and continuing in **1968,** by giving the accused the option to be tried and sentenced by the military judge alone, the role of court members has changed so drastically that it is hardly worthy of being characterized as a *tradition* any longer.[239] This is especially true when one considers that it is the accused[240]—not the convening authority or commanders—who controls members' participation in the court-martial.[241] How important can this tradition be if the military continues to willingly surrender it to the whim of the accused?[242]

Finally, based on comments from both surveys, commanders and convening authorities apparently believe that being sentenced by one's military peers is the "honorable" thing to do. Thirteen of twenty-five Senior Officers' Legal Orientation (SOLO) course attendees indicated that they would choose to be sentenced by members regardless of the nature of the charges.[243] Major General Sennewald, former Commander, Forces Command, summarized this perception before the Advisory Commission to the Military Justice Act of **1983** with the following comment:

> [I]t has to do with the soldier . . . committing an act, [being] found guilty, and [being] sentenced by people who he sees and works with and deals with, being sentenced by the [command] chain, being sentenced by the institution as opposed to a judge alone who is . . . someone he can't identify with as well. . . . It is the relationship, essentially it is a senior group, well senior to him obviously, enlisted if he so desires, who are now being involved in controlling . . . that person's fate as opposed

---

[239] *See* Report, *supra* note 9, at **67-68.**

[240] The military judge also is involved in this decision to the extent he or she does not abuse his or her discretion to grant or deny the accused's request. MCM, *supra,* note **13,** R.C.M. 903(d)(2).

[241] Survey, *supra* note 10, at 95.

[242] *See* Report, *supra* note 9, at 112. (minority report of Mr. Sterritt). "There was little, if any, support for a return to mandatory member sentencing from the senior military commanders who testified before the commission." ***Id.*** Nor does there appear to be any current interest in returning to the practice of mandatory member sentencing. Only one SOLO course attendee suggested this in his comments. Thesis Survey, *supra* note **4.**

[243] Thesis Survey, *supra* note **4.** One convening authority responded that "we are dealing with a system in which an inherent part of the soldiers' perception of fairness and justice is that his fellow soldiers will judge and sentence him from both a legal and soldierly point of view. To retain soldiers' respect and confidence, this is one of those acceptable and necessary 'differences' [from the civilian procedure]." Numerous convening authorities commented that members "represent the institution whose laws have been violated," and have a "direct stake in the sentence adjudged." *Id.*

> again to the judge [who] . . . does not have that same relationship.[244]

Although such sentiment is popular with commanders and senior noncommissioned officers, it is of minimal concern to the typical junior or midlevel soldier facing punishment under the UCMJ. His concern is that he be sentenced by a fair and properly trained sentencing body.

Court member sentencing creates the following problems for the command as well:

5. Mission Disruption.—Any system of justice adopted by Congress and the President must be able to function both in time of war and in time of peace.[245] From the command's point of view, disruption to the mission is one of the biggest drawbacks to member participation in courts-martial. Disruption is magnified during periods of armed conflict. The problems surrounding defense counsel tactics in Operation Desert Storm[246] demonstrate how giving soldiers the option to request trial by members can cause tremendous problems in a combat environment.

Though the right to trial by jury does not apply to the military[247] it is nevertheless a nationally respected and expected right that is not likely to be eliminated any time soon, even in the military.[248] Jury sentencing, on the other hand, is not as universally accepted and is not protected under the Constitution.[249] Consequently, no underlying legal or popular basis exists to support a soldier's interest in court member sentencing other than military tradition. Comparing the interests of the command—to be prepared to fight a war—against the interests of the accused—to choose a sen-

---

[244] Report, *supra* note 9, at 33.

[245] *See* Westmoreland, *supra* note 17, at 20.

> A system of justice must therefore be fully integrated into the Armed Services so that it can operate equally well in war as well as in peace. We need a system that is part of the Army to permit the administration of justice within a combat zone, and to permit our constitution and American legal principles to follow our servicemen wherever they are deployed.

Id.

[246] *See supra* note 238 and accompanying text (discussing defense counsel tactics in Operation Desert Storm).

[247] *See* United States v. Kemp, 46 C.M.R. 162 (C.M.A. 1973) (relying on Ex Parte Quirin, 317 U.S. 1 (1942)).

[248] With the possible exception of straight special courts-martial, where the maximum punishment is only six months confinement. *See* MCM, *supra* note 13, R.C.M. 201(g)(2). This currently is the proposal being evaluated by the Working Group of the Joint Service Committee. *See supra* note 238.

[249] *See supra* note 143 and accompanying text (discussing the absence of a constitutional right to be sentenced by a jury).

tencing forum that he thinks will result in a more lenient sentence—clearly weighs in favor of the needs of the military.

6. *Members* Are ***Not*** *Properly Trained* ***in the*** *Principles* ***of sentencing.—***

> [E]ven the most experienced trial jurist in the civilian community will describe the sentencing process **as** the aspect of the criminal trial which taxes his or her judicial abilities to the limit. The military justice system . . . [continues] to permit this function to be exercised . . . by the court-martial members, if the accused desires. . . . [We] simply cannot leave the task to amateurs. Indeed, this is especially true in the military where the deterrent effect of a sentence may have a direct affect on the maintenance of the discipline of a combat unit.[250]

No one can question the integrity and motivation of the officers and enlisted personnel selected to serve **as** court members. Nevertheless, they are simply out of their element when it comes to adjudging appropriate sentences for courts-martial. Of the five purposes of sentencing listed in the *Benchbook*,[251] the only area in which members might possibly have an advantage over a military judge is in assessing the effect the sentence may have on unit discipline.[252] But adjudication of an appropriate sentence requires more than understanding its potential effect on unit discipline.

> [T]he determination of an appropriate sentence turns on more than the degree of moral approbation which the offense commands. In the military context, it also requires more than evaluation of the effect of the offense on discipline within the local command. "An enlightened sentencing decision today calls for a sophisticated and informed judgment which takes into account a vast range of additional factors, from the likelihood that the defendant will commit other crimes to the types of programs and facilities which may induce a change in the pattern activity which led to the offense."[253]

---

[250] Report, supra note 9, at 205 (separate Statement of Professor Kenneth F. Ripple).

[251] *See* BENCHBOOK, supra note 21, para. 2-59.

[252] *See* Survey, *supra* note 10, at 21 (demonstrating a definite split between convening authorities and attorneys regarding **who** has a better understanding of sentencing ramifications).

[253] *Id.* at 90 (minority opinion of Mr. Sterritt, citing **ABA** Standards Relating to Sentencing Alternatives and Procedures § 1.1(b) (Sept. 1968)).

The military judge is at a decided advantage with respect to evaluating these additional factors necessary for determining an appropriate sentence. The military judge is a trained jurist, certified by The Judge Advocate General.[254] Military judges traditionally have extensive experience as both a trial and defense counsel before assuming a seat on the bench. Judges attend an initial three-week Military Judges' Course at The Judge Advocate General's School of the Army (TJAGSA) to develop the skills necessary to be certified, and to serve, as a military judge, Additionally, military judges may attend an annual judicial conference sponsored by the United States Army Trial Judiciary, and the annual Criminal Law New Developments Course at TJAGSA, to refine these skills. Of course, not all trial judges are equally capable. Some may not be as experienced or as knowledgeable as others, and some will impose an occasional inappropriate sentence. But the answer to this problem does not lie in retaining the power in an even less qualified panel of court members.[255]

Conversely, members have little or no formal training in military justice in general, and sentencing in particular.[256] Prospective court members with any kind of law-related training or background, such as military police and inspectors general, often are challenged for cause precisely because of this background.[257] In light of the differences in training and experience, judges are much better qualified to adjudge a sentence that best serves the "needs of the community, the accused, and the army."[258]

---

[254] UCMJ art. 26 (1984).

[255] *See* Report, *supra* note 9, at 76 (citing ABA Standards Relating to Sentencing Alternatives and Procedures, § 1.1(c) (Sept. 1968)). Nor can juries possibly be expected to develop this expertise for the one or more courts-martial they might participate in. Id. at 75. **See** *also* United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957) (judges' instructions cannot be expected to make up for the years of training and experience that military judges bring to each court-martial).

[256] A select few brigade and battalion commanders have the opportunity to attend the SOLO course at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. This course is designed to orient brigade and battalion level commanders on the legal issues they are likely to confront as commanders. One of the electives offered includes an hour of instruction on sentencing principles and procedures. It touches on punishments, confinement, parole, clemency, and good time. Ironically, it is this type of information that members are specifically instructed not to consider. **See** *infra* notes 279-84 and accompanying text. Most likely, the intent of the SOLO course is to train commanders in legal issues related to their duties as convening authorities and commanders as opposed to preparation for duty as potential court members.

[257] *See* MCM, *supra* note 13, R.C.M. 912; United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983) (individuals assigned to military police duties should not be court members).

[258] BENCHBOOK, *supra* note 21, para. 2-39.

Numerous appellate court decisions regarding the admissibility of sentencing evidence have turned on the members' unfamiliarity with the intricacies of sentencing.[259] In *United States* v. *Hill*,[260] the COMA recognized that the problem with military sentencing is that members, when they are the sentencing body, cannot be trusted to properly evaluate all of the evidence that might otherwise be relevant and admissible on sentencing. Consequently, it is necessary to limit the evidence to which they are exposed. In *United States v. Boles*,[261] the COMA ordered a rehearing on sentence after the military judge erroneously admitted a letter of reprimand during the sentencing phase of the court-martial.[262] The COMA concluded that the appellant was prejudiced because trial counsel's inflammatory argument confused the members regarding their duties during sentencing.

In *United States v. Montgomery*,[263] the COMA affirmed the practice that permitted military judges to consider "any personnel" records of the accused, but limited members to only information from those records "which reflects the past conduct and performance of the accused."[264] The stated intent of this practice was to broaden the information available to the sentencing body. Apparently, this was only applicable to military judges. *Montgomery* provides one of the clearest demonstrations of the differences between a military judge and lay court members with respect to sentencing. In *Montgomery*, the COMA presumed that the military judge could distinguish between material and immaterial evidence contained in the personnel records and base his sentence on only the former,[265] whereas members had to have this issue decided for them by the military judge.

That the military judge is the presiding officer[266] who rules on

---

[259] *See* Vowell, *supra* note 64, at 67 (discussing former Chief Judge Fletcher's opinion that one of the deficiencies of military sentencing was the lack of evidence before the sentencing body, and how the members' inability, during sentencing, to properly apply evidence that a military judge would otherwise be presumed to understand and properly apply influenced his view).

[260] 4 M.J. 33 (C.M.A. 1977).

[261] 11 M.J. 195 (C.M.A. 1981).

[262] The COMA held that the letter of reprimand was inadmissable because it was issued by the commander for the specific purpose of aggravating the court-martial sentence, not as a management tool. Id. at 199.

[263] 42 C.M.R. 227 (C.M.A. 1970).

[264] UCMJ para. 75d (1969).

[265] 42 C.M.R. at 231. See *also* United States v. Philippson, 30 M.J. 1019 (A.F.C.M.R. 1990); United States v. Williams, 34 M.J. 1127 (A.F.C.M.R. 1992) *aff'd on* reconsideration 35 M.J. 812 (A.F.C.M.R 1992) ("future dangerousness" of accused inadmissable, but military judge presumed to limit consideration to proper factors only).

[266] MCM, *supra* note 13, R.C.M. 801(a)(1)-(5).

all evidentiary motions[267] and objections[268] is further proof of his or her superior training and skill in the law. To reduce the risk of exposing members to potentially inadmissible evidence, the military judge conducts such motions out of their presence.[269] When ruling on motions and objections, the military judge is not bound by the rules of evidence, save those related to privileged communications.[270]

Prior to 1957, members had been permitted to review the Manual during deliberations. This process was first criticized by the COMA in United States v. *Boswell*,[271] and later prohibited in United States *v. Rinehart*.[272] In *Rinehart*, the trial counsel directed the members' attention to provisions of the Manual regarding the Army policy on discharging thieves. During deliberations the members "discovered" two other provisions in the Manual that generated requests for further guidance from the law officer.[273] These queries from the members prompted the COMA to conclude that trial counsel's tactics caused a "virtual race to the manual" during deliberations despite full and adequate instructions from the law officer.

> We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the *Manual*, indiscriminately rejecting and applying a myriad of principles—judicial and otherwise—contained therein. The consequences that flow from such a situation are manifold. . . . It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer. . . . [T]he great majority of court members are untrained in the law. A treatise on the

---

[267] *Id.*

[268] *Id.* MIL. R. EVID. 104(a) (preliminary questions concerning the admissability of evidence shall be determined by military judge).

[269] *Id.* MIL. R. EVID 103(a) which states that "in a court-martial composed of a military judge and members, proceedings shall be conducted to the extent practicable, so as to prevent inadmissable evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members." See also id. MIL. R. EVID. 104(e): "Hearings on the admissability of statements of an accused under MIL. R. EVID. 301-306 shall be in all cases conducted out of the hearing of the members."

[270] *Id.* MIL. R. EVID. 104(a).

[271] 23 C.M.R. 369 (C.M.A. 1957).

[272] 24 C.M.R. 212 (C.M.A. 1957).

[273] The paragraphs cited by the trial counsel were paragraphs 33h and 75a(5) of the 1951 *Manual*. The passages discovered by the members were paragraphs 76a(3) (previous convictions) and 76a(4) (factors which may be considered are penalties adjudged in other cases for similar offenses). The members asked the law officer for information on sentences in other similar cases and for an explanation of what paragraph 76a(3) meant. The law officer instructed the members to decide this case on its facts alone and to disregard paragraph 76a(3). Id. at 214.

> law in the hands of a nonlawyer creates a situation which is fraught with potential harm, especially when one's life and liberty hang in the balance.[274]

*(a) **Evidence** of Aggravation and Rehabilitation Potential.*—The endless amount of appellate litigation concerning evidence of rehabilitation potential and aggravation provides recent examples of court members' limitations during sentencing.[275] Even when such evidence is otherwise relevant and admissible, the military judge must apply a balancing test to ensure that the probative value of the evidence is not substantially outweighed by the danger that it will cause unfair prejudice, confuse the issues, or mislead the members.[276] If the balance weighs in favor of unfair prejudice, the members will be deprived of relevant evidence that often is important to determining an appropriate sentence.[277] Military judges also have acted as referee between the government and defense regarding inadmissible aggravation evidence that the government wants to include in a stipulation of fact, as part of the pretrial agreement between the accused and the convening authority.[278]

(b) Collateral Consequences.—Awareness of the collateral consequences of a court-martial sentence is yet another area where court members lag far behind the military judge. In *United States v. Griffin*,[279] the COMA affirmed the general rule that "courts-martial [are]to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the col-

---

[274] *Id.* at **216-17.**

[275] *See, e.g.*, United States v. Horner, **22** M.J. **294** (C.M.A. 1986), United States v. Ohrt, **28** M.J. **301** (C.M.A. 1989), United States v. Aurich, **31** M.J. 95 (C.M.A. **1990);** United States v. Claxton, **32** M.J. **159** (C.M.A. **1991);** and United States v. Goodman, **33** M.J. **84** (C.M.A. **1991).** For cases involving evidence in aggravation see United States v. Wingart, **27** M.J. **128** (C.M.A. **1988)** (uncharged misconduct is irrelevant unless it relates directly to the accused's offense); United States v. Hall, **29** M.J. **786** (A.C.M.R. **1989)** (evidence of absence and escape from custody to avoid court-martial are only relevant to defendant's rehabilitation potential; uncharged distribution of crack cocaine was not directly related to charged offense and therefore inadmissable); United States v. King, **30** M.J. **334** (C.M.A. **1990** (government cannot offer evidence that accused appeared before the United States Disciplinary Barracks disciplinary board on **19** occasions while confined because it is not directly related to charged offense).

[276] MCM, *supra* note **13,** MIL. R. EVID. **403.**

[277] *See generally* United States v. Zengel, **32** M.J. **642** (C.G.C.M.R. **1991);** United States v. Martin, **20** M.J. **227, 230** n.5 (C.M.A. **1985).**

[278] *See* United States v. DeYoung, **29** M.J. **78** (C.M.A. **1989)** (military judge must make ruling if defense counsel objects to uncharged misconduct in the stipulation of fact); *but* see United States v. Vargas, **29** M.J. **968** (A.C.M.R. **1990)** (although evidence inadmissable, accused agreed to permit use in return for a favorable sentence limitation, and no evidence of government overreaching).

[279] 25 M.J. **423** (C.M.A. 1988), *cert. denied,* **487** U.S. **1206 (1988).**

lateral administrative effects of the penalty under consideration."[280] This may deprive the accused of the opportunity to present important evidence to the members.[281] For example, members may be permitted to hear testimony about a rehabilitative program for sex offenders at the United States Disciplinary Barracks, but not be informed of the sentence length necessary for the accused to be incarcerated there.[282]

Judges, on the other hand, are cognizant of the administrative consequences of their sentences and are permitted to consider this knowledge in arriving at a proper sentence.

> Among the objects of punishment is rehabilitation, and parole is one of the correctional tools utilized to facilitate rehabilitation of prisoners. Thus in seeking to arrive at an appropriate sentence, Judge Wold properly took into account the rules governing parole eligibility. Indeed, military judges can best perform their sentencing duties if they are aware of the directives and policies concerning good-conduct time, parole, eligibility for parole, retraining programs, and the like.[283]

Further complicating the problems of collateral consequences is the convening authority's power to consider these factors during his posttrial review.[284] If this information is appropriate for the conven-

---

[280] In *Griffin*, the COMA nevertheless affirmed the trial court's ruling because the defense counsel consented to the proposed instruction concerning the effect a punitive discharge would have on the accused's retirement benefits. Moreover, the COMA noted that what might be labeled as a "collateral" consequence of a sentence, is often the "single most important" matter to the accused and the sentencing authority. Consequently, such a factor should hardly be considered collateral, but rather directly related to the offense and the accused and therefore should be instructed on by the military judge. *Griffin*, 25 M.J. at 424. Chief Judge Everett, in his concurring opinion, wrote that it is appropriate for members or the judge to consider the collateral consequences of various sentencing alternatives. Id. at 425 (Everett, J. concurring).

[281] *See* United States v. Rosato, 32 M.J. 93 (C.M.A. 1991) (military judge erred by denying accused important right to testify about the Air Force Correction and Rehabilitation Squadron).

[282] Vowell, *supra* note 64, at 97.

[283] United States v. Hannan, 17 M.J. 115 (C.M.A. 1984) (the accused entered into a pretrial agreement with the convening authority limiting confinement to one year. The judge sentenced the accused to one year and one day so that he would be eligible for parole within six months. Soldiers sentenced to a year or less are not eligible for parole and, consequently, have to serve the full term less any good time. Despite the military judge's intent, appellant's complaint that he should get the benefit of parole was denied by the COMA).

[284] MCM, *supra* note 13, R.C.M. 1107(b)(3)(B)(iii) (before taking action, convening authority may consider "such other matters as he deems appropriate"). See *also Hannan*, 17 M.J. at 124 (staff judge advocate should discuss in his posttrial review how parole eligibility is affected if Confinement is reduced pursuant to pretrial agreement).

ing authority to consider in deciding whether or not to approve a sentence, it also should be considered by the sentencing body, who assesses the sentence in the first place. Instructing court members not to consider these important consequences is another reason to eliminate them from the sentencing process.

(c) Members *Create Risk of Compromise* Verdicts.—Compromise verdicts can occur under two different circumstances. In the first instance, if the members cannot agree on findings, they might agree to adjudge a lighter sentence in return for a concession on guilt. It also can work in reverse, with the members agreeing to acquit the accused of some charges or to convict him of a lesser offense, with the understanding that they will impose a sentence more severe than might otherwise be imposed for the lesser offense.[285] The significance of compromise verdicts cannot be overemphasized; they strike at the cornerstone of our criminal justice system—that guilt be proven beyond a reasonable doubt.[286]

Although the majority of those surveyed in **1983** believed that compromise verdicts occur only on an "infrequent basis,"[287] that they occur at all is reason enough to eliminate a practice that increases the risk of such verdicts.

(d) Members *are Unduly Influenced* by *Emotion.*—All parties involved in military justice share the common belief that the sentences of military judges are more consistent because they are not swayed by the emotional aspects of a case.[288] Judges have "heard it all before," and are not as easily impressed by argument, or influenced by a particularly aggravated offense, as are members seeing or hearing such evidence for the first time. This tendency of human nature to "toughen up" after repeated exposure to certain behavior is confirmed by the comments of two staff judge advocates and one SOLO course attendee that members' sentences tend to

---

[285] *See* Report, *supra* note **9,** at **29, 45;** E.A.L., *supra* note **5,** at **995** (discussing jury nullification in drunk driving cases).

[286] One commentator noted:

> It has often been stated that in determining the defendant's guilt the jury should focus only on the evidence before it and should not be swayed by the nature of the punishment which would follow a verdict of guilty. However, when the jury is to determine the sentence in addition to the issue of guilt or innocence, this principle is taxed to the breaking point.

E.A.L., *supra* note **5,** at 986-97.

[287] *See* Report, *supra* note **9,** at **45** (contrary to general conclusion reached by the Advisory Commission that compromise verdicts occur "infrequently," were responses from all lawyer groups in the **1983** survey that indicated compromises "sometimes" occur. Survey, *supra* note **10,** at **23.**

[288] Fifteen of sixty-eight staff judge advocates commented that members are more likely to be swayed by emotion and argument of counsel in their sentencing deliberations. Thesis Survey, *supra* note **4.**

become more severe the longer they sit.[289] Responses from defense counsel indicate that they prefer a fresh panel as opposed to one that is near the end of its term.[290]

From the defendant's perspective, the impact emotion may have on an accused's sentence can be positive or negative, depending on the direction in which the flames are fanned. But in the end, justice is much better served when emotion is left at the doorstep to the deliberation room.

7. Undue Reliance on Convening Authority and Courts of Military Review to Correct Erroneous Sentences.—

> The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased.[291]

The respective courts of military review have similar powers of review under Article 66, UCMJ.[292]

Reliance on the convening authority's clemency powers to correct errors and mitigate sentences can be traced to the original Articles of War of 1775.[293] During these early years of military justice the convening authority was the only one who had access to evidence about the accused that might be relevant to an appropriate sentence.

Although much of the information that was once exclusively reserved for the convening authority's consideration is now available to the members, the convening authority still may consider ample information that is not disclosed to the members.[294] Appellate courts have relied on these posttrial powers of the convening authority and courts of review as an excuse to continue a sentencing pro-

---

[289] *Id.*

[290] *Id.*

[291] MCM, *supra* note 13, R.C.M. 1107(d) (this power even extends to those offenses that carry a mandatory punishment. *Id.* R.C.M. 1107(d)(2).

[292] UCMJ art. 66 (1984) states:

> In a case referred to it, the Court of Military Review may . . . affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the evidence.

[293] Rollman, *supra* note 58, at 215.

[294] MCM, *supra* note 13, R.C.M. 1107(b)(3)((B)(iii) (before considering such matters, convening authority must give the accused notice and an opportunity to respond). Id.

cedure that exposes itself to unnecessary risks of error.[295] In *United States* v. *Warren*,[296] the COMA, though noting the increased risk of error that results from permitting members to consider an accused's perjury during trial, felt that it was neutralized by the unique sentence review available in military justice. "The convening authority—who often will have been provided extensive information about an accused—and the Court of Military Review, can grant relief by reducing the sentence if it appears that excessive weight was given by the sentencing authority to the accused's mendacity."[297]

The fallacy of this practice is readily apparent. The military should not rely on the convening authority or courts of military review to determine whether a particular sentence is appropriate or lawful, when they never have seen nor heard the accused in person and must rely on a written record of trial.[298] Instead, permit the body that is actually deliberating on the sentence to have access to at least as much information as the body that ultimately will review their decision. As Brigadier General Ansell noted many years ago, "[s]urely we need not point out to a lawyer that clemency, even when generously granted, is a poor remedy in the case of a soldier who should not have been convicted [or sentenced] at all."[299]

Appellate review of an excessive sentence provides the accused a woefully inadequate remedy. Many soldiers wrongfully or excessively confined will have served their periods of confinement by the time their case is reviewed on appeal.[300] Moreover, the convening authority and courts of review can do nothing to remedy the inappropriately lenient sentence that may have a greater impact on unit morale and discipline.[301]

D. The Judiciary

1. Member Sentences ***Provide*** Judges ***a Basis for Comparison.*** — One of the arguments offered in favor of member sentencing is that

[295] Two staff judge advocates surveyed listed posttrial review by the convening authority and appellate courts as a safeguard against errant member sentences. Thesis Survey, *supra* note 4.

[296] 13 M.J. 278 (C.M.A. 1982).

[297] *Id.* at 284.

[298] Byers, *supra* note 8, at 100.

[299] *See* Brown, *supra* note 8, at 12.

[300] In fiscal year 1990 the total time for appellate review, from the date of trial to date of written opinion from the ACMR, averaged 217 days. In fiscal year 1991 the average posttrial processing time was 182 days. In fiscal year 1992 the average was 201 days. The average processing time from end of trial to action by the convening authority was 52 days in fiscal year 1990, 66 days in fiscal year 1991, and 74 days in fiscal year 1992. Information provided by the Clerk of Court, the United States Army Court of Military Review, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

[301] *See supra* text accompanying note 183 (discussing effects of unduly lenient sentence on unit morale and discipline).

court member sentences serve as a benchmark for military judges during their sentencing deliberations.302 However, statistics show that member participation in sentencing is sporadic (less than one-third)[303] and it is widely recognized that the sentences members adjudge often are on either the high or low end of the spectrum. Member sentences may well be a factor for military judges to consider in fashioning their sentence, but should be no more so than a sentence reached by a fellow member of the bench.

One would hope that our military judges do not reduce what they have otherwise determined to be an appropriate punishment for an offense simply to encourage future accused soldiers to elect to be sentenced by a military judge as opposed to court members. These concerns are irrelevant to the determination of an appropriate sentence in the case currently before the military judge. Eliminating the accused soldier's option to elect court members for sentencing will save military judges from the temptation to consider the impact of their sentence on future decisions concerning the sentencing forum.

2. *Member* ***Sentencing Requires Jury*** Instructions.—When an accused selects members for sentencing, the military judge is placed on the proverbial "horns of a dilemma." It generally is recognized that the sentencing body needs as much information as possible to adjudge an appropriate sentence.[304] But members are untrained, inexperienced and often are unable to understand and properly consider much of the evidence that is relevant to sentencing. Consequently, the judge is faced with either excluding otherwise relevant evidence, or admitting it and then trying to fashion proper instructions to ensure that the evidence is properly considered by the members.305 Although the former may result in a "cleaner" record on

---

302 All groups, except appellate judges and Marine Corps staff judge advocates, agreed that judges may moderate their sentences to encourage soldiers to continue requests for judge alone trials. Survey, *supra* note **10,** at **21.** Four of forty-seven staff judges advocates surveyed felt that this was true. However, thirteen of fifteen trial judges, the parties most affected by this observation, strongly disagreed that this occurred. Thesis Survey, *supra* note **4.**

303 *See supra* notes **174-75** (courts-martial statistics).

304 *See* United States v. Sauer, **15** M.J. **113, 116-17** (C.M.A. **1983)** (salutary principle that a sentencing authority should be provided with as much information as possible).

305 The Advisory Commission to the Military Justice Act of **1983** noted as follows:

> In view of the complicated nature of sentencing, as compared to the determination of a fact, significant time and effort must be expended by the judge in fashioning his instructions, communicating his instructions and ensuring the members proper understanding. Even then, there is no assurance that an inexperienced members [sic] can follow these instructions without error. The possibility of error and reversal on appeal generates additional consumption of judicial and military resources.

Report, *supra* note 9, at **91** (minority report of Mr. Sterritt). See BENCHBOOK, *supra*

appeal, it also may result in an incomplete picture for the sentencing body. The latter option, although painting a more accurate and complete picture for sentencing, also increases the risk of appellate error.

A hotly contested presentencing hearing before members is like walking through a minefield for the military judge. The sentencing phase is filled with appellate landmines waiting to be tripped by the slightest misstep of the military judge. There are few roadsigns to guide judges through this minefield. The only instructions required by the *Manual* are that the members be advised (1) of the maximum punishment, (2) of proper deliberation procedures, (3) that they should consider all evidence in aggravation and extenuation and mitigation, and (4) that they are not to rely on the possibility of mitigating action by the convening or higher authority.[306] Fortunately, military judges can turn to the ***Benchbook*** for guidance on additional instructions if the need arises—such as, the effect of a guilty plea, and explanation of sworn versus unsworn statements made by the accused.[307] The judge may elect to summarize the evidence in aggravation and mitigation.[308] He or she also may choose to instruct members on collateral consequences, provided the accused consents.[309] Military judges venturing off the beaten path of sentencing instructions, however, often find themselves challenged on appeal.[310]

---

note 21, para. 1-2 (no standardized set of instructions can cover every situation arising in a trial by courts-martial. Special circumstances will invariably be presented requiring instructions not dealt with in Benchbook).

[306] MCM, *supra* note 13, R.C.M. 1005(e).

[307] BENCHBOOK, *supra* note 21, para 2-37. See *supra* notes 47-52 and accompanying text (discussing jury instructions). The guidance contained in the Benchbook is deficient for two reasons; (1) there is insufficient detail to help judges craft meaningful instructions; (2) it is subject to being overruled since it is only a DA pamphlet. See Vowell, *supra* note 64, at 95.

[308] MCM, *supra* note 13, R.C.M. 1005(e)(4) discussion; BENCHBOOK, *supra* note 21, para. 2-37.

[309] *See* United States v. Griffin, 25 M.J. 423 (C.M.A. 1988).

[310] *See* United States v. Warren, 13 M.J. 278 (C.M.A. 1982). After discussing the complexity of determining whether an accused lied in court and its impact on the sentence, Judge Kastl commented that "it is one thing to permit a trained judge to consider an accused's false testimony in reaching a sentence . . . but it is quite a different matter to permit a court-martial consisting of members to do this." In its opinion affirming the AFCMR's decision to permit members to perform this difficult task, the COMA joined in Judge Kastl's concern that "the particular pet we welcome today into our judicial household will not easily be housebroken." Id. at 284. See United States v. Below, ACM S26133 (A.F.C.M.R. 28 Oct. 1983) (sentence set aside where military judge instructed panel to consider accused's awards and decorations but failed to mention combat service); United States v. Kirkpatrick, 33 M.J. 132 (C.M.A. 1991) (plain error to instruct members to consider Army policy on drugs). Compare United States v. Chavez, 28 M.J. 691 (A.F.C.M.R. 1991) (military judge erred by instructing on defendant's failure to express remorse, but it was not error to

Appellate review of jury instructions regarding rehabilitation potential demonstrates the tightrope judges must walk with respect to crafting their sentencing instructions. In *Warren*,[311] the COMA offered the following "guidance" for judges to follow when instructing members on the effect an accused's mendacity may have on rehabilitation potential:

> Finally, the members should be alerted that this factor may be considered by them only insofar as they conclude that it, along with all the other circumstances in the case, bears on the likelihood that the accused can be rehabilitated. They may not mete out additional punishment for the false testimony itself. This distinction is a real one and it must be clearly drawn by the military judge in his instructions and morally adhered to by the individual members when voting on the sentence.[312]

Despite the COMA's best intentions, Warren confused this area of the law even more. The question now is, if an accused lacks rehabilitation potential, does that mean that his or her sentence should be longer or that the accused should be discharged?

The COMA attempted to clarify this issue in United States *v. Aurich*[313] by holding that rehabilitation potential is a mitigating factor and that lack of such potential is not an aggravating factor.[314] Rather than settle the matter, Aurich simply created a new issue—whether evidence of rehabilitation potential could be offered in the government's case in chief on sentencing, or only in rebuttal.[315] The existing body of law on evidence of rehabilitation potential undoubtedly is in a complete state of confusion.

Before deciding how to instruct court members on discretion-

---

instruct on defendant's lack of remorse) with United States v. Holt, 33 M.J. 400 (C.M.A. 1991) (consideration of accused's recalcitrance in admitting guilt is appropriate in the proper case).

[311] *Warren*, 13 M.J. at 286.

[312] *Id.* at 286.

[313] 31 M.J. 95 (C.M.A. 1990).

[314] *Id.* "In other words, if an offense does not ordinarily warrant a punitive discharge, then it would be inappropriate to award such a discharge to an accused because he lacked 'rehabilitation potential.'" But see id. at 100. (Sullivan, C.J. concurring in part, dissenting in part) (military tradition that commander's opinion whether accused could be restored to his former place in unit was common measure of rehabilitation potential in the military). It appears that Chief Judge Sullivan's view has prevailed. In United States v. Goodman, 33 M.J. 84 (C.M.A. 1991) the COMA found harmless error in asking "Do you want . . . [the accused] back in your unit?" and "Do you think he [the accused] has a place in the Army?" because it is self-evident that most people have qualms about having someone in the unit or the service who has "torched" the barracks. Id. at 86.

[315] *See* United States v. Claxton, 32 M.J. 159 (C.M.A. 1991).

ary issues, the judge initially must decide whether instructions need to be given. In *Warren,* the COMA cautioned military judges about giving any instructions sua sponte or over defense objection.[316] Trial judges also should exercise caution regarding other curative instructions that only may serve to highlight or reinforce evidence that members are instructed not to consider.[317]

Sentencing with court members requires instructions. Instructions require the military judge to put his or her thought process on the record. The more the judge's thoughts are on the record, the more likely and easily they are challenged on appeal. Because judge alone sentencing leaves no such paper trail, it is much less likely to be challenged on appeal. Even when judge alone sentences are challenged, appellate courts are much more inclined to give the military judge the benefit of the doubt and presume that the judge knew the law and properly applied it.[318]

E. Public Perception

> A judicial system operates effectively only with public confidence—and, naturally that trust exists only if there also exists a belief that triers of fact act fairly.[319]

On the positive side, the public sees that a soldier facing a court-martial has the choice of being tried and sentenced by court members or a military judge.[320] That soldiers facing courts-martial have this option is important to the general public because of the public's perception—right or wrong—that courts-martial are not as fair as the state and federal criminal justice systems and that courts-martial are more likely to punish soldiers more severely than do state or federal judges.[321]

---

[316] United States v. Warren, 13 M.J. 278, 285 n.5.

[317] *See* MCM, supra note 13, MIL. R. EVID. 105.

[318] *See* United States v. Montgomery, 42 C.M.R. 227, 231 (C.M.A. 1970) (military judge presumed to know and consider only relevant evidence). Compare United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982) (hearing on sentence was before military judge; under such circumstances the COMA found no prejudicial error) *with* United States v. Boles, 11 M.J. 195, 199 (C.M.A. 1981) (in view of the severe sentence adjudged in court-martial, the COMA's misgivings as to its impact on the members are justified); *compare* United States v. Williams, 35 M.J. 812 (A.F.C.M.R. 1992) (expert testimony of accused's "future dangerousness," harmless because military judge gave it the diminished weight it deserved) *with* United States v. King, 35 M.J. 337 (C.M.A. 1992) (expert testimony about pedophiles before members constituted plain error).

[319] United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954).

[320] This choice is somewhat illusory because the accused has to forfeit his or her right to a trial by peers to avoid being sentenced by such an untrained sentencing authority. See supra notes 28-37 and accompanying text (regarding accused's forum choices).

[321] Over the years, courts-martial have developed the reputation for being hand-picked by the convening authority for the purpose of adjudging severe punishment. Report, supra note 9, at 88. See supra note 105.

The positive value that the public sees in giving soldiers the choice between court members and a military judge is that soldiers have the means to avoid being convicted and sentenced by aggressive members prone to convict and impose heavy-handed sentences—not because soldiers need a means to avoid being tried and sentenced by an experienced military judge. The public perception problem lies with court members, not with military judges. Consequently, if court members are eliminated from sentencing, the need for choice no longer would exist in the eyes of the public, because our soldiers will have the same options as a defendant in the state or federal system—that is, trial by judge or jury with sentencing to be determined by a trained jurist.[322]

VI. Consequences of Change to Mandatory Judge Alone Sentencing

A. The Accused

With mandatory judge alone sentencing, accused soldiers no longer would need to concern themselves with the potential sentencing consequences of their decision to be tried on the merits before the military judge or court members.[323] Ironically, this may result in more contested trials before members than we see today, because accused soldiers no longer will face the fear of a severe sentence from members who may find them guilty.[324] Although this may reduce the savings in manpower and administrative costs originally viewed as a potential benefit from mandatory judge alone sentencing, it nevertheless is a change well worth any potential additional cost. The accused's choice of forum will be based on the more important and constitutionally protected issue of guilt or innocence, as opposed to the potential severity of the sentence.

A related benefit to the accused is the realization that sentences will be more consistent.[325] If nothing else, this may relieve some of the accused's pretrial anxiety. Having a better idea of the

---

[322] Eliminating members for sentencing will not be an overnight cure for the public's perception of the military justice system. That soldiers would have the same procedural rights as civilian defendants and would no longer face the prospect of being sentenced by "hard-charging" court members would be a positive step.

[323] *See supra* notes 28-37, 170-72 and accompanying text (regarding factors affecting forum selection).

[324] Defense counsel perceive that an accused stands a better chance of acquittal before members. Thesis Survey, *supra* note 4. However, this opinion often was offered with the caveat that the nature of the charge and offense may affect the opinion. Most defense counsel agreed that court members were easier to confuse and more likely to return equitable acquittals.

[325] Survey, *supra* note 10, at 22 (all members (except Navy CMR judges who split evenly) overwhelmingly agreed that sentences from military judges are more consistent in similar cases than those determined by court members).

range within which the sentence is likely to fall may encourage accuseds to contest charges they might otherwise plead guilty to because they no longer need the safety net of a pretrial agreement to protect them from the much more unpredictable sentences members are prone to adjudge. Knowing that there is relative certainty as to the sentence that might be adjudged also will provide counsel and the accused firmer ground from which to enter pretrial negotiations.

The accused will benefit from being sentenced by a jurist who is trained in law and penology.[326] Even if we were to assume that members know more about the effect of a sentence on discipline in the community,[327] several other factors enter the equation to reach an appropriate sentence. Military judges are far more qualified to assess these factors than lay court members. Moreover, by making this the sole responsibility of judges they will continue to develop these skills at an even faster pace, as they perform the sentencing function more frequently.

One drawback for the accused is the loss of perhaps his biggest bargaining chip in pretrial negotiations. Forty-five of the sixty-eight staff judges advocates agreed that waiver of trial or sentencing by members often had a significant effect on pretrial negotiations.[328] Over half of the defense counsel surveyed indicated they were successful in obtaining a better pretrial agreement for their client by offering to waive sentencing by the members.[329] But accuseds will not necessarily have to come to the bargaining table empty handed. The government's biggest interest in pretrial negotiations is the guilty plea itself.[330] Because accuseds may be more inclined to demand trial on the merits before members—because they need no longer fear the possibility of a severe sentence from members—the government may be more inclined to enter into a favorable pretrial agreement.

The most adverse consequence for the accused is the loss of the option to choose the forum for sentencing that is likely to adjudge the more lenient sentence.[331] But the accused does not have a con-

---

[326] *See supra* notes **254-74** and accompanying text (discussing the training and qualifications of military judges).

[327] *See supra* notes **217-25** and accompanying text (discussing community input from court members).

[328] Thesis Survey, *supra* note 4.

[329] *Id.* This reflects a significant change from prior defense tactics. In **1983,** defense counsel "seldom" offered waivers of trial or sentencing by members as an incentive for a pretrial agreement. Survey, *supra* note 10, at **24.**

[330] *See* Report, *supra* note 9, at 94.

[331] Defense counsel and staff judge advocates noted that several circumstances exist in which the accused may fare better if sentenced by members—such as man-

stitutional right to be sentenced by members.[332] Consequently, the military does not need to continue to protect a sentencing procedure that effectively issues the accused a silver platter on which to have the members serve him a more lenient sentence.

Finally, the military may be overestimating the importance of protecting the accused's forum options. All parties surveyed in 1983, except defense counsel, agreed that eliminating the choice would not deprive the accused of a substantial benefit.[333]

B. Government—Trial Counsel

Mandatory judge alone sentencing benefits the government in numerous ways. The risks of appellate error[334] and command influence[335] would be reduced significantly. Compromise verdicts would virtually disappear.[336] Sentences would be more uniform and based on a more complete picture of the offender.[337] Finally, the accused would no longer be able to "forum shop" for a more lenient sentence.[338] Without members, the rules of evidence could be fully relaxed for both the government and defense, thereby permitting the trial counsel to offer more relevant evidence about sentencing without having to "pigeon hole" it to fit one of the specific categories listed in Rule for Courts-Martial 1001.

It is uncertain how mandatory judge alone sentencing will effect the administrative burden associated with court members. On the one hand, members' time away from regular duties will be reduced by the

---

slaughter, unsympathetic victim, an accused with an outstanding military record, offenses that prompt members to think to themselves "there but for the grace of God go I." Thesis Survey, *supra* note 4.

[332] *See supra* note 143 (discussing constitutional aspects of jury sentencing).

[333] Survey, *supra* note 10, at 21. Unfortunately, the committee did not offer a definition of what was meant by "substantial." Additionally, the responses became more mixed when asked if it would "appear" to deprive the accused of a substantial right. A strong indication that this right is not so important is that accuseds are waiving sentencing and trial by members in two of every three cases, and sentencing by members in eight out of every ten guilty pleas. See *supra* notes 174-75 (statistics on the composition of courts-martial).

[334] *See supra* notes 188-91, 348-51 and accompanying text (discussing the risks of appellate error associated with instructions to court members).

[335] The counter-argument to command influence is that the remedy is not to revamp the entire process, but to prosecute those who commit such acts. Report, *supra* note 9, at 45. This argument is defective because unlawful command influence is practically impossible to prove and is usually the result of ignorance as opposed to intentional acts. See United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).

[336] *See supra* notes 285-87 and accompanying text (discussing the risks of compromise verdicts associated with court members).

[337] *See supra* notes 180-85, 205-10 and accompanying text (discussing sentence disparity and evidentiary limitations applicable to court members).

[338] *See supra* notes 178-79 and accompanying text (discussing "forum shopping").

amount of time normally spent on sentencing. This may not be much of a savings, as the members may have to be present for the merits portion of the trial regardless. The biggest savings would be in guilty pleas, where members would no longer be involved at all. However, the ultimate impact may actually be more trials on the merits before members as the accused no longer faces the prospect of a severe sentence if convicted by a panel. But the advantage to the government is that the accused's forum selection will be made without undue concern over sentencing considerations.339

C. Commanders—Court Members

The most significant advantage for court members is that they no longer will be asked to do a job they are unqualified to perform. Although convening authorities and commanders overwhelmingly felt that they had sufficient understanding of the principles of sentencing to determine an appropriate sentence, judges and attorneys felt otherwise.340

Although officer and enlisted court members may not be spared the burden of court-martial duty as much as originally hoped, the additional time spent by members deciding guilt or innocence will be far more meaningful than that currently spent attempting to perform the sentencing function about which they know little.

Furthermore, the time and effort court members put into sentencing often appears needlessly spent. An accused who pleads guilty under current procedures still can demand sentencing by members. If the accused has the benefit of a pretrial agreement with a sentence limitation, the sentence adjudged by the members is immaterial, except from the standpoint of the occasional accused who happens to "beat the deal."341 But members who sincerely deliberate on what they perceive to be a fair and just sentence, only to later discover that their sentence was reduced by the terms of a pretrial agreement, are likely to feel frustrated and ponder why the system asks them to adjudge a sentence when it has been predeter-

---

339 One could argue that the current requirement that the accused be sentenced by members to be tried on the merits by members, interferes with his or her S i h Amendment right to a jury trial.

340 Survey, *supra* note 10, at 20 (convening authorities felt that judges and members adjudged inappropriately severe or lenient sentences evenly. Judges and counsel felt members do so more often. As for who could better adjudge an appropriate sentence, only convening authorities favored members. Even defense counsel felt judges could better decide an appropriate sentence).

341 Several defense counsel commented that sentencing before members is ideal when the accused has a pretrial agreement, because the accused has nothing to lose in return for the chance at an unusually light sentence from the members. Thesis Survey, supra note 4.

mined by the convening authority.[342] Conversely, military judges, because they understand the system, are not likely to become as frustrated.

Commanders also stand to benefit from more consistent results, because they are the ones who must deal with the consequences an unduly harsh or lenient sentence may have on morale and discipline within the unit. Commanders will be deprived of the perceived benefit of offering their input on the type and amount of punishment necessary to maintain discipline in the military. However, the importance of this input was not supported by the **1983** Advisory Commission Survey. All groups agreed that mandatory judge alone sentencing would not deprive the command of important powers.[343] But convening authorities and the Army staff judge advocates did agree that it would "appear" that command authority had diminished.[344] On closer scrutiny, the relative unimportance of command input is not surprising. After all, member participation is controlled by the accused, who selects members only when it is perceived to be in his or her best interests.

Commanders need not worry that their input on discipline no longer will play a role in courts-martial sentencing. Their opinions regarding the "significant adverse impact on the mission, discipline or efficiency of the command directly and immediately resulting from the accused's offense" still can be offered by the trial counsel during the sentencing phase of the trial.[345] Trial counsel also can include the command's opinion in the sentencing argument to the military judge.[346]

Finally, the vast majority of day-to-day discipline in the military occurs outside the courtroom, and is taken care of within the unit through training, leadership, counseling, and the administration of nonjudicial punishment under Article 15, UCMJ.[347]

---

[342] *See* Byers, *supra* note 8, at **89.** In calendar years **1965** and **1966** the Army tried **3029** general courts-martial. **67.4%** were guilty pleas. Of these guilty pleas, **80%** were entered pursuant to a pretrial agreement, thus limiting, to some degree, the effect of the members' sentence. Of course, in those instances when the members adjudge a sentence below that set forth in the pretrial agreement, the accused will reap the benefit of the lower sentence.

[343] Survey, *supra* note 8, at **21.**

[344] *Id.* at **22.**

[345] *See* MCM, *supra* note **13,** R.C.M. 1001(b)(4); Report, *supra* note **9,** at **96.**

[346] One potential compromise that would continue to provide members a mechanism to contribute their views on the effect the adjudged sentence will have on discipline within the command is to permit the members to attach to their findings of guilt a recommendation to the military judge that in their collective opinion, the crime(s) committed warrant lenient or severe punishment.

[347] Westmoreland, *supra* note **17,** at **21.** "Some individuals are corrected by encouragement, some by exhortation, and others by criticism. How much and what

D. The Judiciary

Military judges stand to benefit the most from mandatory judge alone sentencing. There no longer will be a need for confusing instructions on the procedures and purposes of sentencing.[348] Fewer instructions will reduce the number of appellate issues. Those issues that are raised rarely will result in prejudicial error, as judges are often presumed to have disregarded inadmissible evidence and to have relied on only evidence properly before the court.[349]

Eliminating members will rid the military of the need to maintain artificial evidentiary procedures. Presentencing hearings no longer would be a matter of gamesmanship between counsel arguing whether certain evidence directly relates to the charged offense, or is unfairly prejudicial to the accused. Defense counsel will not have to decide whether to "open the door" to certain evidence, because it always will be open under the simple rule of relevance. With judge alone sentencing, the rules of evidence could be completely relaxed to admit as much evidence as possible about the offense and the offender without the fear that it will be misused or confuse the issues.[350]

Access to additional information about the offense and the offender is more important in the military than in civilian jurisdictions because of the variety of punishments permissible under the UCMJ. In addition to fines and confinement—which can be adjudged in state and federal criminal trials—a military court-martial must consider the appropriateness of a punitive discharge, restriction, hard labor without confinement, forfeiture of pay, a reduction in grade, or a reprimand.[351]

With mandatory judge alone sentencing, every court-martial sentence would be determined by a military judge fully versed in the collateral consequences of his decision. No longer will sentences from members include confinement for twelve months and sixty-eight days in a feeble attempt to account for the administrative consequences of a court-martial sentence.[352]

There will be fewer instances of unlawful command influence because judges are better insulated from the influence of com-

---

type of correction is used is part of leadership. By far, most correction is done outside the system of military justice."

[348] *See* **supra notes 304-18 and accompanying text.**

[349] *See* **supra text accompanying note 318.**

[350] *See* **Vowell, supra note 64, at 96.**

[351] *See* **MCM, supra note 13, R.C.M. 1003(b).**

[352] *See* **United States v. Balboa, 33 M.J 304 (C.M.A. 1991).**

mand.[353] The military judge is not rated by the convening authority, or anyone else involved in the military justice system.[354] Even within the Judge Advocate General's *Corps*, the judiciary is treated as a separate division.[355]

One further advantage of mandatory judge alone sentencing is that sentences will be less influenced by emotion and argument of counsel.[356] Judges are jurists, trained to minimize the role emotion may play during sentencing deliberations. Judges have "seen and heard it all before" and are therefore less inclined to be swayed by inflammatory arguments and heinous crimes as are members who are usually seeing and hearing about such events for the first time.

The lone drawback to mandatory judge alone sentencing is the loss of member sentences as a check against which military judges can balance their sentences.[357] This loss is insignificant when one considers how few sentences are currently adjudged by members, and that most judges state that they are not affected by this information.[358]

A related concern is that military judges given exclusive control over sentencing will abuse their discretion and adjudge unduly harsh or severe sentences.[359] In the unlikely event this should ever occur, the convening authority and courts of review have the authority to grant clemency or correct what they find to be an excessively severe sentence.[360] The convening authority's clemency power may fill the void caused by the loss of community input from member sentencing. The convening authority can reduce any sentence he or she feels

---

[353] *See* UCMJ arts. 26(c), 37 (1984); United States v. Butler 14 M.J. 72, 74 (C.M.A. 1982). *But see* United States v. Mabe, 33 M.J. 200 (C.M.A. 1991).

[354] *See Butler*, 14 M.J. at 74 (C.J. Everett, concurring) (one of the two obvious reasons an accused would want to be tried by judge alone is a "desire to be tried by an official who is not under the command of the convening authority who referred the charges for trial").

[355] *See* UCMJ art. 26 (1984); DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 8 (25 Jan. 1990) (United States Army Trial Judiciary—Military Judge Program).

[356] All parties surveyed unanimously agreed that judges are much less influenced by emotion and arguments of counsel. Thesis Survey, *supra* note 4.

[357] *See supra* notes 217-26 and accompanying text (discussing community input provided by court member sentencing).

[358] Twelve of fifteen military judges stated that the sentences of members do not affect the sentences they adjudge. Thesis Survey, *supra* note 4.

[359] All groups surveyed in 1983, except appellate judges and Marine Corps staff judge advocates, agreed that judges are influenced not to exceed the sentences adjudged by members in similar cases so as not to discourage requests for judge alone trials. Survey, *supra* note 10, at 21.

[360] Convening authorities are limited in that they cannot increase punishment for what they perceive to be an inappropriately lenient sentence. As judges are much more likely to sentence within a reasonable range, chances are rare that there will be a need for corrective action.

is excessive, thereby communicating to the judge the command's perspective on the amount of punishment a particular offense warrants.

E. Public Perception

> The code is not military jargon. The code has got to be completely understood by the average man on the streets of the United States of America. And so that's why I say, and you see it in my questionnaire, that given the exigencies of military service, we have to approach the daily run of the mill American system of justice as closely as we can.[361]

Mandatory judge alone sentencing undoubtedly will improve the public's perception of the military justice system. The public will observe a system of military justice that continues to more closely resemble the criminal justice system with which the vast majority of our citizens are familiar.[362]

The public no longer will perceive the punishment phase of courts-martial practice as controlled by overzealous commanders bent on severe punishment. The public will hear about fewer cases of disparate sentences. A closer look will reveal a sentencing procedure that permits the military judge to take a complete look at the offender's duty performance and civilian background—tested for reliability by our adversarial sentencing hearing[363]—prior to deliberating on an appropriate sentence. The public also will see a system in which an accused need not forfeit the right to trial by jury to avoid being sentenced by the court-martial panel. Public approval of military justice is critical to its overall success. Eliminating members from the sentencing process will significantly reduce this particular criticism of military justice.

---

[361] Report, *supra* note 9, at 14-15 (quoting testimony of Lieutenant General John Galvin before the Advisory Commission to the Military Justice Act of **1983).**

[362] *See supra* notes 146-60 (forty-two of the fifty states have judge alone sentencing).

[363] The adversarial process need not be abandoned to implement this change. Military personnel records of an accused often contain more information than the typical federal presentence report. The military also has the advantage of being able to order witnesses to testify. The military also has the luxury of calling officers and noncommissioned officers, who live and work with the accused, to offer live testimony subject to cross-examination. Finally, "the soldier is in an environment where all weaknesses and excesses have an opportunity to betray themselves. He is carefully observed by his superiors—more carefully than falls to the lot of any member of the ordinary civil community—and all his delinquencies and merits are recorded systematically." ***See*** Magers, *supra* note 8, at 67.

VII. Conclusion

Court member sentencing is a long-standing military tradition. It has been a part of military justice since the origins of the American military itself. When the jurisdiction of courts-martial were limited to military offenses and other offenses directly impacting on military discipline and readiness, and the general focus of sentencing was simply retribution for the offense as opposed to an individualized sentence tailored to the particular offender, there was little need for a highly trained sentencing body, and court members were capable of performing the task.

With the expanding jurisdiction of military courts-martial over practically all offenses committed by a soldier, and the increasing popularity of individualized sentences that focus on more than just rehabilitation, the sentencing function has developed into a drastically more complicated process. As the goals of sentencing expand to include discipline, individual and general deterrence, and rehabilitation of the individual offender, additional information about the accused and the crime becomes necessary for the sentencing body to accomplish these goals. As the amount of information about the offense and offender increases, so too does the risk that lay court members, untrained in the laws and principles of sentencing, will be prejudiced unduly by what they hear, or will not know how to properly account for this information during their sentencing deliberations.

In a vain attempt to compensate for court members' deficiencies, Congress, through the UCMJ, the President, through the *Manual*, and military appellate courts, through their published opinions, have continually made piecemeal changes to sentencing procedures to protect military accuseds from being sentenced unfairly by court members who know nothing about the principles of sentencing. A much more effective solution is to eliminate court members altogether and turn over the sentencing process exclusively to military judges who are fully trained to perform this complex task.

Having risen from the status of "court judge advocate" to "law officer" and finally to "military judge," the authority of the military judge has grown to where the judge is now the focal point of the military courts-martial. This heightened status of the military judge is apparent not only in the eyes of the Congress, the President, and the military appellate courts, who helped place them in this position, but also in the eyes of the vast majority of soldiers who prefer to be tried and sentenced by a military judge.

Even if the military was to disregard that all of the tangential issues related to sentencing favor the military judge over court mem-

bers—that is, appellate issues, sentence disparity, instructions, administrative burdens, compromise verdicts, and command influence—the simple fact remains: court members are not qualified to perform the sentencing function, military judges are. Since 1969, when first given the shared responsibility for courts-martial sentencing, military judges have proven their mettle, and should be the exclusive sentencing body under the UCMJ.[364]

APPENDIX A

General Courts-Martial Tried Before a Military Judge Alone During the Previous Five Years

FY	Cases	Judge Alone	Percentage
1988	1629	1103	67%
1989	1585	1011	63.8%
1990	1451	995	68.6%
1991	1173	782	67.5%
1992	1168	782	66.6%

Information furnished by the Office of the Clerk of Court, U.S. Army Judiciary, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

APPENDIX B

GUILTY PLEAS

FY	Judge Alone	Members
1988	1455—82%	323—18%
1989	1239—77%	366—23%
1990	1148—80%	283—20%
1991	887—82%	194—18%
1992	1035—82%	208—18%

Information furnished by the Office of the Clerk of Court, U.S. Army Judiciary, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

[364] "Incidentally, I have never had a convening authority complain about a sentence imposed by a judge. . . ." Report, *supra* note 9, at 33 (quoting testimony of Major General Kenneth J. Hodson, before the Advisory Commission to the Military Justice Act of 1983).

THE TWILIGHT ZONE:* POSTGOVERNMENT EMPLOYMENT RESTRICTIONS AFFECTING RETIRED AND FORMER DEPARTMENT OF DEFENSE PERSONNEL

MAJOR KATHRYN STONE**

I. Introduction

> The internal effects of a mutable policy are . . . calamitous. . . . It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be . . . revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow. . . . [H]ow can that be a rule, which is little known and less fixed?[1]

A United States Army colonel visits an installation ethics counselor[2] (counselor), wanting advice on the ethics laws that will affect

---

* *The Twilight Zone* was a popular television show in the 1960s. The author of many of the stones in the show, Rod Serling, defined the "twilight zone" as "[a] middle ground between light and shadow, . . . a place between the pit of man's fears and the summit of his knowledge." A typical story would highlight ordinary people who found themselves in another dimension of sight, mind, and sound involving "extraordinary circumstances dealing with problems of their own or fate's making." Carol Serling, ***Introduction: Breaching the Barriers, in*** JOURNEYS TO THE TWILIGHT ZONE 7 (Carol Serling ed., 1993).

** Judge Advocate General's Corps, United States Army. Presently assigned as Command Judge Advocate, Special Operations Command South, Panama. From 1989 through 1992, the author served as an Ethics Attorney in the Office of The Judge Advocate General, United States Army, Pentagon, first in the Administrative Law Division, and then in the Standards of Conduct Office when it was created in 1990. This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 41st Judge Advocate Officer Graduate Course.

[1] THE FEDERALIST No. 62, at 317 (James Madison) (Bantam Classic ed., 1982). The author gratefully acknowledges Sharon A. Donaldson for the idea for this quotation; See Sharon A. Donaldson, ***Section Six of the Office of Federal Procurement Policy Act Amendments of 1988: A New Ethical Standard in Government Contracting?,*** 20 CUMB. L. REV. 421, 446 n.120 (1989-1990).

[2] Each Department of Defense (DOD) component—that is, military department, such as Department of the Army, Department of the Navy—has a Designated Agency Ethics Official (DAEO), who is responsible for implementation and administration of all aspects of the military department's ethics program. The DAEO appoints ethics counselors and delegates to them written authority to provide ethics advice to department employees. Department of Defense 5500.7-R, Joint Ethics Regulation (JER),

him after he retires in a few months. The colonel informs the counselor that for the last two years, he has not served as a contracting officer or representative thereof and did not, in his opinion, serve as a procurement official. The colonel intends to seek postgovernment employment with several defense contractors with whom he works as a liaison officer on various Army contracts. On further questioning, the counselor discovers that the colonel routinely exercised decisionmaking authority over two major defense systems, and reviewed and approved the statements of work for several procurements. The colonel's colleagues advised him to speak with an ethics counselor before seeking postgovernment employment. What should the ethics counselor's advice be?

Ethics counselors encounter this type of scenario on a daily basis; it is particularly acute at contracting commands and installations, and at the Pentagon.[3] Department of Defense (DOD) regulations require DOD personnel to consult a DOD component legal counsel or, if appropriate, the DOD component's Designated Agency Ethics Official (DAEO) "[i]f the propriety of a proposed action or decision is in question because it may be contrary to law or regulation."[4] Executive Branch regulations encourage employees to seek the advice of their agency DAEOs when they have questions regarding standards of conduct.[5]

No easy answer exists to the question: "What should the ethics counselor's advice be?" Department of Defense officials, especially military officers, are subject to complex and confusing postgovernment employment restrictions. Accordingly, postgovernment employment ethics counseling is fraught with danger. Some of the

---

Aug. 30, 1993, paras. 1-214, 1-401(b), and 1-413. The JER, issued under the authority of DOD Directive 5500.7, Standards of Conduct, August 30, 1993, prescribes standards of conduct required of all DOD employees.

[3] The author encountered this and other similar type scenarios dozens of times during a three-year assignment in the Office of The Judge Advocate General (OTJAG), Headquarters, Department of the Army (HQDA). Until July 1991, standards of conduct (ethics) and postgovernment employment issues pertaining to Army personnel that rose to the HQDA level were handled in the Administrative Law Division, OTJAG, HQDA. Pursuant to Secretary of the Army approval, a new legal office was created to handle these issues, and became operational in July 1991 as the Standards of Conduct Office, Department of the Army (DA SOCO). Standards of Conduct Office attorneys provide ethics advice, counseling, and training to the HQDA staff and its field operating agencies, and assist Army ethics counselors worldwide in their counseling and training efforts.

[4] Standards of Conduct, 32 C.F.R. § 40.4(a)(3) (1992).

[5] 5 C.F.R. § 2635.107(b). These regulations further prohibit disciplinary action for violating these regulations against an employee who "has engaged in conduct in good faith reliance upon the advice of an agency ethics official." *Id.* Although reliance on an ethics counselor's advice will not protect a DOD official from prosecution for violating a criminal statute, these regulations point out that such reliance "is a factor that may be taken into account by the Department of Justice." *Id.*

postgovernment employment laws apply only to retired military officers;[6] others apply to *former* procurement personnel;[7] and still others apply to former and retired officers and employees government-wide.[8]

If the foregoing paragraph is confusing, the reader is experiencing a normal reaction on entering the twilight zone of postgovernment employment conflict of interest laws. The five redundant conflict of interest laws addressed in this article are obscure, confusing, overlapping, often unnecessary, and difficult to explain.

Although other ethics laws affect present and former DOD officials, they are beyond the scope of this article.[9] Instead, this article will examine the five postgovernment employment laws and propose that Congress repeal four of them because they are no longer necessary to achieve the congressional goal of safeguarding the integrity of the DOD procurement program. Section II of this article provides a brief overview of these five laws. Section III examines the history and government-wide application of 18 U.S.C. § 207 (restrictions on former officers, employees, and elected officials of the executive and legislative branches), which sufficiently protects the DOD procurement program from postgovernment employment conflicts of interest. Section IV examines the history of the remaining four postgovernment employment laws and argues for their repeal. Section V concludes the article.

II. Entering the Twilight Zone: Postgovernment Employment Restrictions

> The first rudiments of morality, broached by skillful politicians, to render men useful to each other as well as

---

[6] *See, e.g.*, 18 U.S.C. § 281; 37 U.S.C. § 801(b) (retired *regular* military officers).

[7] *See, e.g.*, 41 U.S.C. § 423(f); 10 U.S.C. § 2397 (which only applies to DOD personnel).

[8] *See, e.g.*, 18 U.S.C. § 207.

[9] For the sake of completeness in this area, ethics counselors should be alert to these additional laws because many of them subject the violator to substantial penalties. These ethics laws include: 18 U.S.C. § 209 (receiving compensation from a private source for government work); 18 U.S.C. §§ 203 and 205 (acting for an outside interest in certain dealings with the government); 18 U.S.C. § 285 (unauthorized use of documents relating to claims from or by the government); 50 U.S.C. § 783 (unauthorized disclosure of classified information); 18 U.S.C. § 1905 (unauthorized disclosure of confidential information); and U.S. Const. art. I, § 9 (unauthorized acceptance, by any person holding any office of profit or trust in the federal government, of any present, emolument, office or title, from any king, prince, or foreign state, including all retired military personnel). For an excellent article on the duties of ethics counselors and the dangers inherent in counseling prospective retirees, *see* Alan K. Hahn, United States v. Hedges: ***Pitfalls in Counseling Prospective Retirees Regarding Negotiating for Employment,*** ARMY LAW., May 1991, at 16.

> tractable, were chiefly contrived that the ambitious might reap the more benefit from and govern vast numbers of them with the greatest ease and security.[10]

A. Purpose of the Twilight *Zone*

Since the American Civil War, Congress has enacted several statutes that address conflicts of interest in federal agency procurements. Some of these laws imposed government-wide, postgovernment employment restrictions, while others imposed employment restrictions only on DOD personnel. In many cases these "DOD-unique" laws overlapped with restrictions imposed by the government-wide statutes.[11] Regardless of their applications, however, they shared the purpose of protecting the integrity of the government's procurement process. Congress attempted to prohibit bidders and offerors for a federal agency procurement from gaining unfair competitive advantages by using improper influence or unauthorized access to procurement-sensitive information.[12]

Unfortunately, these individual laws also have contributed a measure of uncertainty and complexity to the postgovernment employment conflicts of interest laws. This result is not surprising. Congress did not adopt these statutes as a package, but enacted them one at a time in response to existing evils that also were important political issues.[13] The executive branch ethics program, and in particular the DOD's ethics program, is "encumbered by a complex, multitiered system of statutory restrictions" that make effective ethics training and counseling difficult to provide.[14] With this foundation, let us briefly consider these statutory restrictions.

B. *Overview* of the Five Statutes in the Twilight *Zone*

1. Government-wide Postgovernment Employment Restrictions.—Title **18,** United States Code, § **207,** applies to former or retired officers or employees of the executive or legislative branches. It sets forth six substantive prohibitions restricting certain postgovernment employment activities of these individuals, with additional restrictions on certain "senior-level" personnel. Only two

---

[10] BERNARD DE MANDEVILLE, AN INQUIRY INTO THE ORIGIN OF MORAL VIRTUE (1723).

[11] STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON CONFLICTOF INTEREST LEGISLATION, pts. I and II, at 2 (Comm. Print 1958).

[12] 136 CONG. REC. S8522-03, S8544 (daily ed. June 21, 1990).

[13] H.R. REP. NO. 748, 87th Cong., 1st Sess. 2 (1961). *See also* President's Message to Congress Relative to Ethical Conduct in the Government, H.R. DOC. NO. 145, 87th Cong., 1st Sess. (Apr. 27, 1961), *reprinted in* 1961 U.S.C.C.A.N. 1141, 1143.

[14] 136 CONG. REC., *supra* note 12, at S8544. *See infra* Appendix A (a brief summary of the postgovernment employment statutes addressed in this article).

of these substantive prohibitions, § 207(a) and § 207(c), are relevant to this discussion.

Subsection 207(a)(1) prohibits former officers and employees from communicating with, or appearing before, United States employees on behalf of someone else, if they intend to influence those United States employees regarding a particular matter in which such former officers or employees participated personally and substantially while employed by the government.[15] For such representation to be prohibited, the United States must be a party to, or have a direct and substantial interest in, that same particular matter.[16] This is a lifetime bar.

Subsection 207(a)(2) imposes the same representational limitations as subsection (a)(1), except that the restriction lasts only for two years after government service terminates. In addition, subsection (a)(2) applies only to particular matters that actually were pending under the individuals' official responsibilities during their last year of government service, rather than matters in which they participated personally and substantially.[17]

---

[15] The pertinent part of subsection 207(a)(1) provides:

> Any person who is an officer or employee . . . of the executive branch . . . , and who, after the termination of his or her service or employment . . . , knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .) in connection with a particular matter—
>
> (A) in which the United States . . . is a party or has a direct and substantial interest,
>
> (B) in which the person participated personally and substantially as such officer or employee, and
>
> (C) which involved a specific party or specific parties at the time of such participation
>
> shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(a)(1) (1992) (emphasis added).

[16] Id.

[17] The pertinent part of subsection 207(a)(2) provides:

> Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . , *knowingly makes, with the intent to influence, any communication to or appearance* before any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .), in connection with a particular matter—
>
> (A) in which the United States . . . is a party or has a direct and substantial interest,
>
> (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment. . . , and

Subsection 207(c) prohibits, for one year after leaving government service, certain former senior-level officers and employees from seeking official action by communicating with, or appearing before, an employee of their former agencies on behalf of someone else.[18]

The remaining four statutes[19] are directed specifically at the conduct of former or current government personnel involved in procurement-related activities. These four statutes became unnecessary by the enactment of the Ethics Reform Act of 1989.[20]

2. *Procurement Integrity Act Restrictions.* —Title 41, United States Code, § 423,[21] prohibits a procurement official[22] from seeking

---

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title

Id. § 207(a)(2) (1992) (emphasis added).

[18] The pertinent part of subsection 207(c) provides:

(1) In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . , who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency shall be punished as provided in section 216 of this title.

(2)(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))—

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay . . . , is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule,

(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade . . . is pay grade 0-7 or above.

Id. § 207(c) (1992) (emphasis added).

[19] 10 U.S.C. § 2397-2397c; 18 U.S.C. § 281; 37 U.S.C. § 801(b); 41 U.S.C. § 423(f).

[20] Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 101(a), 102, 103 Stat. 1716, 1717-18, 1724 (1989) (codified as amended at 18 U.S.C. § 207(c) (West Supp. 1990) (effective Jan. 1, 1991).

[21] The pertinent part of subsection 423(b) provides:

During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indi-

employment with a competing contractor[23] during the conduct of a procurement.[24] It also prohibits a former procurement official from participating, on behalf of a competing contractor, in the performance of the contract resulting from such procurement, or from participating in any negotiations leading to the award or modification of any contract for such procurement.[25] These prohibitions last

---

rectly, in any discussion of future employment or business with, any officer, employee, representative, agent, or consultant of a competing contractor, except as provided in subsection (c) . . . .

41 U.S.C. § 423(b)(1) (1992); *see infra* note 216 for pertinent part of *id.* § 423(c) (recusals).

[22] A procurement official is one who participates personally and substantially in the conduct of a procurement prior to award. The pertinent part of subsection 423(p)(3)(A) provides:

> The term "procurement official" means, with respect to any procurement (including the modification or extension of a contract), any civilian or military official or employee of an agency who has participated personally and substantially in any of the following, as defined in implementing regulations:
>
> (i) The drafting of a specification developed for that procurement.
>
> (ii) The review and approval of a specification developed for that procurement.
>
> (iii) The preparation or issuance of a procurement solicitation in that procurement.
>
> (iv) The evaluation of bids or proposals for that procurement.
>
> (v) The selection of sources for that procurement.
>
> (vi) The conduct of negotiations in the procurement.
>
> (vii) The review and approval of the award, modification, or extension of a contract in that procurement.
>
> (viii) Such other specific procurement actions as may be specified in implementing regulations.

41 U.S.C. § 423(p)(3)(A) (1992).

[23] Subsection 423(p)(2) defines a "competing contractor" as follows:

> The term "competing contractor", with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

Id. § 423(p)(2) (1992).

[24] Subsection 423(p)(1) defines the term "during the conduct of a procurement" as follows:

> The term "during the conduct of any Federal agency procurement of property or services" means the period beginning on the earliest specified date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)-(viii) of paragraph (3)(A), and concluding with the award, modification, or extension of a contract, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations.

Id. § 423(p)(1) (1992); *see supra* note 22 (clauses (i)-(viii) of 41 U.S.C. § 423(3)(A)).

[25] The pertinent part of subsection 423(f)(1) provides:

> No individual who, while serving as an officer or employee of the Gov-

for two years after the former procurement official's last involvement in a procurement.[26]

3. Post-Government ***Employment Restrictions Unique*** to ***the*** *DOD.*—Four sections of Title 10, United States Code, are directed at DOD personnel and their potential or actual employments with defense contractors.

Section 2397 requires certain former military officers and DOD civilian employees to file reports with the DOD if they are employed by major defense contractors, at an annual pay rate of at least $25,000, within two years after separating from the DOD.[27]

Section 2397a imposes recusal requirements on certain military officers and DOD civilian employees who performed procurement functions on defense contracts, and who contact, or are contacted regarding postgovernment employment **by,** the defense contractors to whom the contracts were awarded. Unless the affected individuals reject initial unsolicited employment overtures, they must file

---

ernment or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—

(A) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement. . . .

Id. § 423(f) (1992). Note that under this statute, an enlisted member or noncommissioned officer of the armed forces may be a procurement official, because the statute uses the word "member" rather than "officer or employee" of the armed forces.

[26] *Id.*

[27] The pertinent part of section 2397(b)(2) provides:

(A) If a person to whom this subsection applies [military officers at pay grade 0-4 or above, and civilian employees at pay grade level GS-13 or above] (i) was employed by, or served as a consultant or otherwise to, a defense contractor at any time during a year at an annual pay rate of at least $25,000 and the defense contractor was awarded contracts by the Department of Defense during the preceding year that totaled at least $10,000,000, and (ii) within the two-year period ending on the day before the person began the employment or consulting relationship, the person served on active duty or was a civilian employee for the Department, the person shall file a report with the Secretary of Defense in such manner and form as the Secretary may prescribe. The person shall file the report not later than 90 days after the date on which the person began the employment or consulting relationship.

(B) The person shall file an additional report each time, during the two-year period beginning on the date the active duty or civilian employment with the Department terminated, that the person's job with the defense contractor significantly changes or the person commences an employment or consulting relationship with another defense contractor under the conditions described in the first sentence. A person required to file an additional report under this subparagraph shall file the report within 30 days after the date of the change or the date the employment or consulting relationship commences, as the case may be.

10 U.S.C. 2397(b)(2) (1992). ***See*** *also* 10 U.S.C. 2397(c)(2) (1992).

written reports of the contacts and disqualify themselves from further participation in official matters affecting those defense contractors for any periods of time during which the individuals have not rejected the employment opportunities.[28]

Section 2397b prohibits certain former military officers and DOD civilian employees from receiving compensation from major defense contractors for two years after separating from the DOD if, during a majority of their working days during their last two years of government service, they performed procurement functions (a) at contractors' plants that served as their principal locations of work on those procurements, or **(b)** relating to major weapons systems that involved decisionmaking responsibilities. This prohibition also applies to former general and flag officers and Senior Executive Service (SES) personnel who served as primary United States representatives in negotiating contracts or claim settlements over $10 million during their last two years of government service.[29]

---

[28] The pertinent part of the subsection 2397a(b) provides:

(1) If a covered defense official [military officers at pay grade level 0-4 or above, civilian employees at pay grade level GS-11 **or** above] who has participated in the performance of a procurement function in connection with a contract awarded by the Department of Defense contacts, or is contacted by, the defense contractor to whom the contract was awarded (or an agent of such contractor) regarding future employment opportunities for the official with the defense contractor, the official (except as provided in paragraph (2)) shall—

(A) promptly report the contact to the official's supervisor and to the designated agency ethics official (or his designee) of the agency in which the covered defense official is employed; and

(B) for any period for which future employment opportunities for the covered defense official have not been rejected by either the covered defense official or the defense contractor, disqualify himself from all participation in the performance of procurement functions relating to contracts of the defense contractor.

(2) A covered defense official is not required to report the first contact with a defense contractor under paragraph (1)(A) or to disqualify himself under paragraph (1)(B) if the defense official terminates the contact immediately. However, if an additional contact of the same or a similar nature is made by or with the defense contractor, the covered defense official shall report (as provided in paragraph (1)) the contact and all contacts of the same or a similar nature made by or with the defense contractor during the 90-day period ending on the date the additional contact is made.

Id. § 2397a(b) (1992).

[29] The pertinent part of subsection 2397b(a)(1) provides:

[A] person who is a former officer or employee of the Department of Defense or a former or retired member of the armed forces [these persons are defined in subsection (c)(1) as former military officers at pay grade level 0-4 or above, and former civilian employees at pay grade level GS-13 or above] may not accept compensation from a contractor during the two-year period beginning on the date of such person's separation from service in the Department of Defense if—

(A) on a majority of the person's working days during the two-year

Section 2397c requires major defense contractors to submit annual reports to the Secretary of Defense identifying all former or retired DOD officers and employees who received compensation from those contractors within two years after separating from the DOD. These contractor reports contain information similar to that reported by former officers and employees under § 2397.30

4. Two-Ear Military Selling Statute.—Title 18, United States Code, § 281(a), imposes a two-year prohibition on retired military officers selling anything, on behalf of someone else, to their former military departments.31 Subsection 281(b) prohibits these retired

---

period ending on the date of such person's separation from service in the Department of Defense, the person performed a procurement function (relating to a contract of the Department of Defense) at a site or plant that is owned or operated by the contractor and that was the principal location of such person's performance of that procurement function;

(B) the person performed, on a majority of the person's working days during such two-year period, procurement functions relating to a major defense system and, in the performance of such functions, participated personally and substantially, and in a manner involving decision-making responsibilities, with respect to a contract for that system through contact with the contractor; or

(C) during such two-year period the person [this person is defined in subsection (c)(2) as a military officer at pay grade level 0-7 or above, and a DOD civilian employee at the pay grade level for Senior Executive Service or above] acted as one of the primary representatives of the United States—

(i) in the negotiation of a Department of Defense contract in an amount in excess of $10,000,000 with the contractor; or

(ii) in the negotiation of a settlement of an unresolved claim of the contractor in an amount in excess of $10,000,000 under a Department of Defense contract.

Id. § 2397b(a)(1) (1992).

30 *Id.* § 2397c(b)(1)(A)-(B) (1992).

31 The pertinent part of section 281 provides:

(a)(1) A retired officer of the Armed Forces who, while not on active duty and within two years after release from active duty, directly or indirectly receives (or agrees to receive) any compensation for representation of any person in the sale of anything to the United States through the military department in which the officer is retired (in the case of an officer of the Army, Navy, Air Force, or Marine Corps) or through the Department of Transportation (in the case of an officer of the Coast Guard) shall be fined under this title or imprisoned not more than two years, or both.

(b) A retired officer of the Armed Forces who, while not on active duty and within two years after release from active duty, acts as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States—

(1) involving the military department in which the officer is retired . . .; or

(2) involving any subject matter with which the officer was directly connected while in an active-duty status;

shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 281(a)-(b) (1992).

officers, for the same two-year period, from prosecuting any claim against the United States that involves their former military departments or any subject matter with which the retired officers were directly connected while on active duty.[32] Section 281 subjects violators to criminal sanctions.

5. Three-Year Military Selling Statute.—Title 37, United States Code, subsection 801(b), is the civil companion to 18 U.S.C. § 281. Subsection 801(b) provides for the loss of retired pay if, within three years after regular officers of the uniformed services retire, they sell goods (but not services), for themselves or others, to any of the uniformed services: the DOD, Coast Guard, Public Health Service, or National Oceanic and Atmospheric Administration.[33]

One additional statute is important to postgovernment employment. Even though it does not impose restrictions on postgovernment employment, 18 U.S.C. § 208(a) restricts the activities of government employees who seek postgovernment employment. Specifically, this statute prohibits executive branch officers or employees from particfpating in matters affecting the financial interests of any person with whom the officers or employees are negotiating for, or have an arrangement concerning, future employment. For example, any officers who participate in agency procurements must disqualify themselves from any further participation in that procurement if they want to negotiate for employment with contractors competing for that procurement.[34] Both the Department of Justice

---

[32] *Id.*

[33] The statute provides:

> Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the National Oceanic and Atmospheric Administration, the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service.

37 U.S.C. 801(b) (1992).

[34] The pertinent part of subsection 208(a) provides:

> Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . , participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as an officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—Shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 208(a) (1992).

(DOJ) and Office of Government Ethics (OGE)[35] consider "the unilateral submission of a resume to a competing contractor" (conduct short of "negotiating") as conduct that requires officers to disqualify themselves from further involvement in a procurement.36

C. *The Twilight Zone Itself*

Ethics counselors have recognized that the four statutes discussed above in subparagraphs **B.2** through **B.5** are duplicative in purpose of the restrictions that 18 U.S.C. § **207** and 18 U.S.C. § 208—the two general conflict of interest statutes—impose.37 This overlap is harmful in two respects. First, it creates considerable confusion for former DOD personnel who must abide by the restrictions, but who run the risk of criminal, civil, and administrative penalties if they fail to do so. Second, it imposes a tremendous administrative burden on the DOD ethics program, which not only must keep track of all the required reports but also must develop programs to train, counsel, and guide a variety of affected officials through five sets of multilayered and interlocking restrictions.

The duplicative purpose of these four statutes makes them ripe for repeal. They serve no valuable purpose and have succeeded only in imposing complex, unnecessary restrictions on a select group of DOD personnel. These four statutes attempt to prohibit conduct that already is sufficiently proscribed by 18 U.S.C. § **207** and 18 U.S.C. § 208.

An additional, more compelling reason to repeal these four statutes stems from the passage of the Ethics Reform Act of 1989.[38] Congress passed this Act in the wake of the most recent executive and legislative reviews of the conflict of interest statutes that apply to all three branches of the federal government.[39] One result of this review was that Congress significantly amended 18 U.S.C. § **207** to

---

[35] The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978), established the OGE within the Office of Personnel Management (OPM). The OGE gained separate agency status on October 1, 1989, when Congress enacted the Office of Government Ethics Reauthorization Act, Pub. L. No. 100-598, 1988 U.S.C.C.A.N. (102 Stat.) 3031. The OGE is charged by the Ethics in Government Act with providing overall direction for executive branch policies designed to prevent conflicts of interest and help ensure high ethical standards on the part of agency officers and employees. Pursuant to the Ethics Reform Act of 1989 (as revised by the technical amendments of May 4, 1990, Pub. L. No. 101-280), the OGE is the supervising ethics office for the executive branch. 5 C.F.R. § 2600.101 (1992); see ***supra*** note 20.

[36] 136 CONG. REC., ***supra*** note 12, at S8546.

[37] This statement is based on the author's experience in working with other DOD ethics counselors.

[38] *See* ***supra*** note 20. See *also* text accompanying notes 97-109.

[39] 136 CONG. REC., ***supra*** note 12, at S8545.

make it the "single, comprehensive, postemployment statute applicable to executive and legislative branch personnel who leave government service."[40] A congressional analysis of a subsequent reform bill also acknowledged that § 207's new purpose as the single postemployment statute for the executive branch will remain "thwarted" as long as these four unnecessary statutes—three of which apply exclusively to DOD officials—remain on the books.[41]

In light of the amendments to 18 U.S.C. § 207 made by the Ethics Reform Act of 1989, and the arguments in favor of repealing the four statutes, a review of § 207's evolution is appropriate.

III. The Evolution of Postgovernment Employment Restrictions Imposed By 18 U.S.C. § 207

> Morality is the best of all devices for leading mankind by the nose.[42]

A. In the Beginning Darkness Was Upon the Face of the Deep

That today's postgovernment employment laws are confusing and overlapping is nothing new. Soon after taking office, President John F. Kennedy appointed an Advisory Panel on Ethics and Conflict of Interest in Government to study conflict of interest laws and propose appropriate legislation to ensure high ethical standards in the federal government.43 Congressional investigations into conflict of interest cases in the executive branch prompted much of President Kennedy's interest in these laws. The public increasingly perceived that existing conflict of interest laws were confusing, inadequate for the modern business world, and a hindrance to the government.[44]

On April 27, 1961, President Kennedy transmitted a special message to Congress concerning ethical conduct in government. In his message, President Kennedy noted that some of the conflict of interest laws were enacted before 1873; all were enacted without coordination with any of the others; and no two of them used uni-

---

[40] *Id.*

[41] *Id.*

[42] F.W. NIETZSCHE, THE ANTICHRIST, XLIV.

[43] S. REP. No. 2213, 87th Cong., 2d Sess. 2 (1962), *reprinted* in 1962 U.S.C.C.A.N. 3852.

[44] H.R. REP. No. 748, 87th Cong., 1st Sess. (1961). *See also* Brief for Lawrence H. Crandon at Appendix B, United States v. Boeing Co., 845 F.2d 476 (4th Cir.) (No. 88-931), *rev'd*, 494 U.S. 152 (1990) (providing more detail on the history of congressional and public concern in this area).

form terminology. President Kennedy complained about the overlap and inconsistency among the statutes, and pointed out the following:

> The ultimate answer to ethical problems in Government is honest people in a good ethical environment. No web of statute or regulation, however intricately conceived, can hope to deal with the myriad possible challenges to a man's integrity. . . . Nevertheless formal regulation is required—regulation which can lay down clear guidelines . . . and set a general ethical tone for the conduct of public business.
>
> . . . .
>
> Criminal statutes and Presidential orders, no matter how carefully conceived or meticulously drafted, cannot hope to deal effectively with every problem of ethical behavior of conflict of interest. Problems arise in infinite variation. . . .
>
> . . . .
>
> Although . . . regulation is essential, it cannot be allowed to dissolve into a welter of conflicting and haphazard rules and principles throughout the Government. Regulation of ethical conduct must be coordinated in order to insure that all employees are held to the same general standards of conduct.[45]

In his message to Congress, President Kennedy attached a proposed bill to revise the conflict of interest laws. Several similar bills also were introduced in the House of Representatives.[46] Their shared purpose was two-fold: (1) to simplify and strengthen the conflict laws then in effect; and (2) to facilitate the government's recruitment of part-time employees possessing specialized knowledge and skills without weakening the government's protection against unethical conduct.[47]

On June 1 and 2, 1961, the Antitrust Subcommittee of the House Committee on the Judiciary held hearings on these bills, which resulted in a new bill—H.R. 8140—that passed the House on August 7, 1961.[48] The Senate Committee on the Judiciary held hear-

---

[45] PRESIDENT'S MESSAGE TO CONGRESS RELATIVE TO ETHICAL CONDUCT IN THE GOVERNMENT, H.R. Doc. No. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 1141.

[46] S. REP. NO. 2213, *supra* note 43 (Senate report discusses the legislative history of the House bills).

[47] *Id.*

[48] *Id.*

ings on this bill on June 21, 1962, and supported its enactment.[49] The bill eventually became known as the Bribery, Graft and Conflicts of Interest Act of 1962.[50]

B. Then There Was Light, and the Light Was Good

The Bribery, Graft and Conflicts of Interest Act of 1962 affected two conflict of interest statutes that applied to government officers or employees[51] who represented others in transactions with the government during the two-year period after their government employment terminated: 5 U.S.C. § 99 (former officers or employees not to prosecute claims in departments), and 18 U.S.C. § 284 (former officers and employees disqualified in matters connected with former duties).[52] The 1962 Act covered, among other things, the subject of postgovernment employment activities of former government officers or employees in one new section, 18 U.S.C. § 207.[53] In creating § 207, the Act repealed both 5 U.S.C. § 99 and 18 U.S.C. § 284.[54]

This new 18 U.S.C. § 207 contained the following three subsections:

1. Subsection (a).—In addition to replacing the two-year disqualification (prescribed by the repealed 18 U.S.C. § 284) with a lifetime bar, this subsection also strengthened the law by going beyond claims for money or property to the whole range of matters in which the government had an interest. Subsection (a) perma-

---

[49] *Id.*

[50] Bribery, Graft and Conflicts of Interest Act, Pub. L. No. 87–849, 1962 U.S.C.C.A.N. 3852, 76 Stat. 1119. A detailed history of these various House and Senate bills can be found in the House and Senate reports and *United States Code Congressional and Administrative News* (U.S.C.C.A.N.).

[51] Memorandum Regarding Conflict of Interest Provisions of Public Law Number 87–849 (Jan. 28, 1963), *reprinted in* 28 Fed. Reg. 985 (1963) [hereinafter Conflict of Interest Memorandum].

[52] The legislative history to the Bribery, Graft and Conflicts of Interest Act contains a section-by-section analysis of the conflict of interest laws affected by the act. Pub. L. No. 87–849, 1962 U.S.C.C.A.N. (76 Stat.) 3852. See *supra* note 50.

[53] Conflict of Interest Memorandum, *supra* note 51.

[54] Congress considered 5 U.S.C. § 99 to be an overly protective civil statute no longer needed due to the growth in number and size of the federal government's departments. Section 99 prohibited a former executive branch officer or employee, for two years following the termination of government employment, from representing anyone in the prosecution of a claim against the United States if the claim was pending before any executive branch department while the officer was an employee, even if the individual had been totally unaware of the claim during that period. See Pub. L. No. 87–849, 1962 U.S.C.C.A.N. (76 Stat.) 3853.

Title 18, United States Code, § 284, was a criminal statute similar to 5 U.S.C. § 99, albeit narrower in scope. It prohibited former government employees, for the same two-year period, from prosecuting in representative capacities any claims against the United States involving any subject matter directly connected with the employees' former government jobs. See Pub. L. No. 87–849, 1962 U.S.C.C.A.N. (76 Stat.) 3861.

nently barred former government officers or employees from acting as attorneys or agents for someone else in any matters in which the United States was a party or was interested and in which the officers or employees participated personally and substantially in a governmental capacity.55

2. Subsection *(b).*—This subsection barred former agency employees, for one year after leaving government employment, from ***appearing*** *personally* before courts, departments or agencies as attorneys or agents for another person in connection with a matter in which the government had an interest and which came within the employees' area of official responsibility during their last year of such responsibility.56 Accordingly, this subsection satisfied congressional concerns of harm to the government when supervisory employees terminated their connection with the government one day and came back the next day "seeking an advantage for a private interest in the very area where [they] had just had supervisory functions."57

3. Subsection (e).—Unlike subsections (a) and (b), which addressed the postgovernment activities of former employees, subsection (c) covered situations in which people outside the government could benefit from the improper actions of partners currently employed with the government. It prohibited the partners of government employees from acting as attorneys or agents for someone else in all matters in which those government employees currently were participating, or had participated, personally and substantially for the government, or which came under their official responsibility.58

A close reading shows that this 1962 version of **§ 207** did not prohibit former employees from communicating with their former agencies in ways not involving appearances.59 Not surprisingly, outside interests frequently hire former government employees because of their special knowledge and skills regarding the work of their former agencies. Congress continued to worry that the information, influence, and access that these former government employees acquired during their government employment would provide an unfair and improper advantage to the outside interests that hired them.60 Congress found that public confidence in government had

---

55 18 U.S.C. § 207(a) (1969). *See* also S. REP. No. 2213, supra note 43.

56 *Id.* § 207(b) (1969). *See* also S. REP. No. 2213, supra note 43.

57 S. REP. No. 2213, supra note 43.

58 18 U.S.C. § 207(c) (1969). *See also* S. REP. No. 2213, *supra* note 43.

59 *See supra* note 50, at § 207(a)-(b), 76 Stat. 1119, 1123.

60 S. REP. No. 170, 95th Cong., 2d Sess. 31–33, ***reprinted in*** 1978 U.S.C.C.A.N. 4216, 4247–49.

been ''weakened by a widespread conviction that federal officials [were using] public office for personal gain, particularly after they [left] government service. There is a sense that a 'revolving door' exists between industry and government. . . .''[61] Congress further noted "a deep public uneasiness with officials who switch sides—who become advocates and advisors to the outside interests they previously supervised as government employees.''[62]

C. Let There Be a Firmament in the Midst of the Waters and Let It Separate the Waters

Congress was not alone in its concerns about the ethics of former government employees. One of President Jimmy Carter's campaign promises to the American people was to ensure that the federal government remained devoted exclusively to the public interest. President Carter wanted to ''strengthen existing restrictions on the revolving door between government and private industry''[63] by "broadening the scope of the existing prohibition [18 U.S.C. § 207(a)-(b)] on appearances by former government officials before their former agency of employment.''[64] He also wanted to revise substantially subsection (c).[65]

As a result of these congressional and presidential concerns, Congress enacted the Ethics in Government Act of 1978.[66] This Act revised 18 U.S.C. § 207 by further restricting the activities in which former executive branch officials could become involved after terminating their government employment. This Act's objectives were to prohibit former officers or employees from: (1) exercising undue influence over former colleagues still in office with respect to matters pending before their former agency; and (2) using information gained during their government employment for their own personal, or for a private client's, benefit.[67] As stated in an informal advisory letter from the OGE:[68]

> The harm to the Government is not simply that a former employee might have been able to assist his or her new

---

[61] *Id.* at 32, *reprinted in* 1978 *U.S.C.C.A.N.* 4216, 4248.

[62] *Id.*

[63] President's Message to Congress Transmitting Proposed Ethics in Government Act of 1977, 1 PUB. PAPERS 786 (May 1, 1977) [hereinafter President Carter's Message].

[64] Beth Frensilli, *Ethics in Government Act, Statutory Interpretation of Ambiguous Criminal Statutes: An Analysis of Title 18, Section 207(c) of the United States Code*, 58 GEO. WASH. L. REV. 972, 973 (1990).

[65] President Carter's Message, *supra* note 63.

[66] The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

[67] S. REP. No. 170, *supra* note 60, at 1978 U.S.C.C.A.N. 4216, 4247.

[68] *See supra* note 35.

> employer in a matter before leaving Government. The harm also includes the use or the apparent use of inside information gained about competitors of the new employer who were parties to a matter prior to the new employer's expressed interest. Protection from this harm is necessary to the preservation of the integrity of the Government's contracting process.[69]

Congress intended the 1978 version of § 207 to be the new standard bearer for proper ethical conduct by former government officials by further restricting their postgovernment employment actions.

*1. **Subsection** (a).*—This subsection imposed a lifetime ban on former officers or employees from aiding, assisting, or representing anyone other than the United States in matters involving specific parties with which they were involved personally and substantially while employed in the government.[70]

2. Subsection (b).*—**This subsection prohibited former officers or employees, for a period of ***two years following their government employment, from ***appearing before*** or ***communicating with*** any agency or court on any matter involving specific parties which came within their official responsibility during their last year of government employment.[71]

3. Subsection** (c).*—This subsection prohibited certain former high-ranking officers and employees, for a period of ***one year after terminating their government employment, from having any contact with their former agencies on any matter then pending before such agencies, even if the former employees were not involved personally in the matter as a government employee.[72]

In addition to broadening the scope of the lobbying restrictions in § 207, Congress had discovered another flaw that needed correction: the 1962 version of § 207 contained only criminal sanctions.[73] Congress believed that the noticeable lack of criminal prosecutions under § 207 was attributable to the Justice Department's reluctance to bring a criminal indictment against former high-level officers or

---

[69] Office of Government Ethics Letter 84 x 15, 1984 WL 50153 (O.G.E. Nov. 19, 1984).

[70] 18 U.S.C. § 207(a) (1982). ***See** also* S. REP. No. 170, *supra* note 60, *reprinted in* 1978 U.S.C.C.A.N. 4216, 4250.

[71] 18 U.S.C. § 207(b) (1982). ***See** also* S. REP. No. 170, *supra* note 60, *reprinted in* 1978 U.S.C.C.A.N. 4216, 4250.

[72] 18 U.S.C. § 207(c) (1982). ***See** also* S. REP. No. 170, *supra* note 60, *reprinted in* 1978 U.S.C.C.A.N. 4216, 4250.

[73] S. REP. No. 170, *supra* note 60.

employees.74 In Congress's opinion, this reluctance to prosecute essentially rendered the statute unenforceable.

Accordingly, Congress included in the Ethics in Government Act of **1978** an "administrative mechanism" that permitted agencies to determine violations of **§ 207** and impose meaningful penalties on violators.75 Title **V** of the Act permitted agencies to bar violators from practice or contact before their former agencies for up to five years.[76]

D. Let the Waters Be Gathered Together and Let the Dry Land Appear

A more detailed history of the Ethics in Government Act of **1978** is beyond the scope of this article and has been covered elsewhere.[77] Nevertheless, in passing the **1978** Act, Congress stated that it had found "too much ambiguity, confusion, inconsistency, and obscurity" in the existing conflict of interest laws. Congress **was,** therefore, "especially conscious of the matter of clarity of language and terminology" in passing the statutory revisions comprising the **1978** Act.[78] Unfortunately, the language Congress used in certain parts of the **1978** version of **§ 207** was not **as** clear and unambigous as Congress intended it to be.

In its entirety, **§ 207** attempts to prevent even the appearance of the use of public office for private or personal gain. Congress used the **1978** Act to revise subsection (c) based on President Carter's recommendation to strengthen then-existing revolving door restrictions. The revised subsection (c) prohibited certain high-ranking government officials, within one year after their government employment ceased, from "knowingly" appearing before the government agencies in which they previously were employed, or to communicate with such agencies "with the intent to influence" former colleagues, on behalf of someone other than the United States, in connection with any particular matter pending before the agencies or in which these agencies had "direct and substantial interest[s]."[79]

---

74 *Id.*

75 **Id.**

76 *Id.*

77 **For the historical development of the Ethics in Government Act of 1978, Pub. L. No. 96-521, 92 Stat. 1824, *see* Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707 (1981).**

78 S. REP. No. **170, *supra* note 60.**

79 **The pertinent parts of subsection 207(c) provide:**

> **Whoever [meaning certain high-ranking officials identified in subsection (d)], within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the**

The case involving Franklyn C. Nofziger epitomizes the ambiguity in the existing conflict of interest laws. On July 16, 1987, a grand jury indicted Mr. Nofziger on four counts alleging lobbying activities in violation of subsection 207(c).[80] Mr. Nofziger had served as Assistant to the President for Political Affairs for President Ronald Reagan from January 1981 to January 1982. Trial began on January 11, 1988, and on February 11, 1988 the jury found Mr. Nofziger guilty on three of the four counts.[81]

The first count involved a letter from Mr. Nofziger to Edwin Meese III, then-Counselor to the President, urging White House support of one of Mr. Nofziger's clients in its efforts to secure a contract from the Army to manufacture small engines. Mr. Nofziger's letter informed Mr. Meese that his client was "having some problems with the Army" and advised Mr. Meese that awarding the contract to his client, who was located in Bronx, New York, would promote President Reagan's well-publicized commitment to revitalizing the South Bronx.[82] The second count involved Mr. Nofziger's use of his influence in urging James E. Jenkins, then-Deputy Counselor to the President, to support another Nofziger client in its efforts to secure the use of civilian crews on noncombat Navy vessels. Mr. Nofziger knew President Reagan had promised during his 1980 presidential election campaign to implement such a program.[83] The third count involved Mr. Nofziger's attempts on behalf of another client to influence the White House to support funding for the purchase of his client's military aircraft. Congress had not authorized funding for these purchases, but Mr. Nofziger knew of President Reagan's interest in the matter due to a memorandum the President had sent to the Secre-

---

intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 207(c) (1982) (amended 1989) (emphasis added).

[80] United States v. Nofziger, 878 F.2d 442, 444 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989). The government later sought and obtained the dismissal of two counts alleging violations of subsection 207(a).

[81] *Id.*

[82] *Id.* at 445.

[83] *See* Frensilli, *supra* note 64, at 973 n.28.

tary of Defense, urging him to encourage export sales of that same aircraft.[84]

On April 8, 1988, Mr. Nofziger was sentenced to pay $30,000 in fines and serve consecutive terms of imprisonment of two to eight months on each of the three counts. The district court stayed execution of Mr. Nofziger's sentence pending his appeal.[85]

E. Let There Be Lights in the Heavens to Give Light Upon the Earth

On June 27, 1989, by a divided panel, the District of Columbia Circuit Court of Appeals overturned Mr. Nofziger's conviction. The majority found 18 U.S.C. § 207(c) ambiguous as to its mens rea requirements.[86] Judge Thomas A. Flannery, the presiding judge in Mr. Nofziger's trial, actually recognized this ambiguity and stated that "the big problem with this case is that we are dealing with a statute that is hardly a model of clarity."[87]

On appeal, the District of Columbia Circuit Court considered the question of which parts of subsection (c) were modified by the adverb "knowingly": the appearance clause alone ("knowingly acts as agent or attorney for, or otherwise represents . . . in any appearance before"), and/or the communication clause ("or, with the intent to influence, makes any . . . communication . . . to").[88] The Government argued that it did not prove the knowledge element at trial because "knowingly" applied only to the appearance clause and Mr. Nofziger was charged with violating the communication clause. Mr. Nofziger argued that "knowingly" modified the entire sentence, *both* the appearance and communication clauses. This would require the Government to prove, before Mr. Nofziger could be found guilty, that he knew at the time he communicated with the White House that the subjects of his communications were then pending before, or of "direct and substantial interest" to, the White House.[89] The Government failed to prove this element. The appellate court, for its part, noted that the 1978 revisions had stranded the mens rea "knowingly" in a "grammatical no man's land in which it is uncertain whether it applies to both" the appearance and communication offenses, "or just the appearance offense."[90]

---

[84] *Nofziger*, 878 F.2d 442, 445.

[85] *Id.*

[86] *Id.* at 452.

[87] *Id.* at 445 (citing Record at 3416, United States v. Nofziger, No. 87-0309 (D.D.C. 1988)).

[88] *Id.* at 444.

[89] *Id.*

[90] *Id.* at 450.

Unfortunately, 18 U.S.C. § 207 has no common-law predecessor.[91] Accordingly, the courts, and agencies charged with developing regulations implementing the law, were left to interpret and apply § 207 as written by Congress according to the "plain and ordinary meaning of its words."[92] After analyzing the legislative history of subsection (c) and finding the congressional intent unclear, the District of Columbia Circuit Court, in a two-to-one decision, adopted Mr. Nofziger's narrow interpretation of subsection (c) and overturned his three convictions.93The majority found that the statute's mens rea required knowledge of each element denominated in the offense, not just the appearance clause. The majority's reasoning followed the well-established rule that presumes a statute's mens rea requirement should apply to every element of the offense in the absence of a clear legislative intent to the contrary.[94] The majority further noted that "[i]f the government's interpretation . . . were correct, a prudent man would avoid even permissible lobbying of his former agency within one year of his departure because the existence of an unsuspected direct and substantial agency interest could convert what he believed to be a permissible communication into a felony."[95] ***Nofziger*** demonstrates Congress's failure to use clear and unambiguous language when drafting conflict of interest laws.[96]

F. Let the Waters Bring Forth Creatures and Great Sea Monsters

Subsection 207(c)'s ambiguous mens rea requirement was not a new phenomenon to Congress. In 1980,[97] the Senate Judiciary Com-

---

[91] United States v. Nofziger, No. 87-0309, 1987 U.S. Dist. LEXIS 14134, at *27 (D.D.C. Nov. 10, 1987).

[92] *Id.*

[93] *Nofziger*, 878 F.2d 442, 454. A rehearing was denied, although four of the nine members of the circuit believed that the decision was "clearly wrong." In a concurrence written by Circuit Judge Edwards, in which Judges Wald, Mikva, and Ginsburg, Ruth B., joined, Judge Edwards wrote: "I think that the majority opinion in this case is clearly wrong; however, this is not a basis for an en banc consideration by the court. Therefore, I concur in the denial of . . . [a]rehearing en banc." *Id.* at 460.

[94] "The second applicable rule states that absent evidence of a contrary legislative intent, courts should presume mens rea is required." *Id.* at 452 (citing United States v. Liparota, 471 U.S. 419, 426 (1985)). The author credits Matthew T. Fricker and Kelly Gilchrist for the idea for using this quote. *See* Matthew T. Fricker & Kelly Gilchrist, United States v. Nofziger *and the Revision of 18 U.S.C.§207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, n.26 (1990).

[95] *Nofziger*, 878 F.2d at 454.

[96] This summary of Mr. Nofziger's case is intentionally brief because the Nofziger district and circuit court opinions already have been analyzed superbly, and in great depth, by other authors. *See* Frensilli, *supra* note 64; *see* also Fricker & Gilchrist, *supra* note 94.

[97] The Senate Judiciary Committee reported

> No Federal statute attempts a comprehensive and precise definition of

mittee recognized that different courts could require "'different states of mind for the same elements of the same offenses" because Title 18 gave no "explicit direction to judges, jurors, lawyers, or citizens on how to determine the mens rea requirements, if any, for each element of offenses defined in it.''[98]

Congress reacted to the *Nofziger* decision with unusual speed. In November 1989, Congress amended subsection 207(c) when it enacted the Ethics Reform Act of 1989 (1989 Ethics Reform Act).[99] This Act—which affected more than subsection 207(c)—became "the first comprehensive reform of ethics laws in more than a decade.''[100] Of interest to the *Nofziger* situation, though, are only the changes the 1989 Ethics Reform Act made to subsection 207(c).

This new subsection (c), which remains in effect today, focuses less on the role of the agency being lobbied by the former government employee and more on the goal or purpose of the person lobbying.[101] Effective January 1, 1991, subsection (c) eliminated the requirement for the prohibited contact—that is, appearance or communication—to be in connection with a matter "pending before such department or agency or in which such department or agency has a direct and substantial interest.''[102] Subsection (c) now requires only that the prohibited contact be "in connection with any matter on which [the former employee] seeks official action.''[103]

Subsection (c)(1)—which revised former subsections (c)(1) through (3)—currently reads, in pertinent part, as follows:

[A]ny person who is an officer or employee . . . of the

---

the terms used to describe the requisite state of mind. Nor are the terms defined in the statutes in which they are used. Instead the task of giving substance to the "mental element" used in a particular statute, or to be inferred from a particular statute, has been left to the courts.

S. REP. No. 553, 96th Cong., 2d Sess. 59 (1980).

[98] Fricker & Gilchrist, *supra* note 94, at 805.

[99] *See supra* note 20. The Ethics Reform Act of 1989 inadvertently excluded military officers (and members of the civilian uniformed services, such as the Public Health Service) from the criminal conflict of interest laws by defining "officers" and "employees" to include only civilian personnel. Consequently, Congress enacted technical amendments to the Act to remedy this situation, among others. The amendment makes clear that "officers" and "employees" include officers of the uniformed services on active duty. Ethics Reform Act of 1989: Technical Amendments, Pub. L. No. 101-280, 1990 U.S.C.C.A.N. (104 Stat.) 169, 173.

[100] 162 CONG. REC. S15,953 (daily ed. Nov. 17, 1989) (statement of Sen. Levin). Senator Levin further noted that the ethics part of the bill "strengthens existing laws that apply to all three branches . . . ranging from postemployment lobbying restrictions . . . [F]or the first time . . . we would bring Members of Congress and top congressional staff under the postemployment lobbying restrictions of 18 United States Code section 207." *Id.* at S15,953-54.

[101] Fricker & Gilchrist, *supra* note 94, at 846.

[102] 18 U.S.C. § 207(c)(3) (1988).

[103] *Id.* § 207(c)(1) (1992).

> executive branch . . . who is referred to in paragraph (2) [certain former senior personnel], and who, within 1 year after the termination of his or her service or employment . . . *knowingly makes, with the intent to influence, any communication to or appearance before* any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.[104]

In addition to having changed the focus of the lobbying restriction, subsection (c) reduced the burden of proof imposed by the District of Columbia Circuit Court on the government by revising the mens rea requirement that caused the appellate court so much trouble in *Nofziger:* Congress sought to ensure that its intent could not be misinterpreted again. Therefore, Congress incorporated language in subsection 207(c)(1) to clarify two points: (1) the terms "knowingly" and "with intent to influence" apply to both the appearance offense and the communication offense;[105] and (2) no requirement exists that former senior employees know that the particular matters for which they are now lobbying are pending before, or are matters of direct and substantial interest to, their former agencies.[106] Senator Carl M. Levin (D-Mich.), a cosponsor of the bill resulting in the 1989 Ethics Reform Act, specifically noted that the District of Columbia Circuit Court's reversal of Mr. Nofziger's convictions did not reflect congressional intent.[107] Although very little legislative history explains the 1989 Ethics Reform Act's specific changes to subsection 207(c),[108] Senator Levin's comments regarding the Reform Act make congressional intent on this matter quite clear:

> One matter we have addressed . . . has to do with the knowing standard. In the recently decided case involving former Presidential aide Lyn Nofziger, the court of appeals held that under the current law the word "knowing" modified all the elements of the offense including the pro-

---

[104] *Id.* **(emphasis added).**

[105] **Ethics Reform Act** of **1989,** *supra* **note 20. See** *also* **Frensilli,** *supra* **note 64, at 982.**

[106] **Ethics Reform Act of 1989,** *supra* **note 20, § 101(a), 103 Stat. 1716, 1717-18.**

[107] **162** CONG. **REC.** S15,954 **(daily ed. Nov 17, 1989) (statement of Sen. Levin).**

[108] **"The Act** was **moved through Congress in a couple of weeks, and no committee or conference reports were prepared." Murdock,** *Finally, Government Ethics as if* **People Mattered:** *Some* **Thoughts on the Ethics** *Reform Act* of *1989,* **58 GEO. WASH.** L. REV. **502,503 (1990).** *See* **Fricker & Gilchrist,** *supra* **note 94, at 846-47.**

> vision that the particular matter was pending before the subject department or agency or that the agency had a direct and substantial interest in the particular matter. That judicial interpretation does not reflect congressional intent. We correct that misinterpretation in this bill by including a knowing standard only for the act of making the communication with the intent to influence and state that the offense is committed if the former employee seeks official action by an agency or department employee. There is no requirement, here, that the former employee know that the particular matter on which he or she is lobbying was a matter of interest or was pending before the subject agency or department. Thus, we are able to set the record straight on this matter.[109]

G. Let the Earth Bring Forth Creeping Things and Beasts

An intriguing point is that subsection 207(c)'s mens rea requirement still may be ambiguous. Two authors have postulated that Congress, "[i]n its attempt to 'set the record straight,' [has] instead succeeded in enacting a statute that is as ambiguous as the one it replaced."[110] They argue that subsection (c) is both syntactically and semantically ambiguous.[111] According to their analysis, subsection (c) is syntactically ambiguous because the reader is uncertain how far down the sentence "knowingly" travels; in other words, "[a]n interpretive problem arises because the language of the statute does not specify if the prosecution must prove that the former employee knew that the subject of the communication involved official action."[112] These authors argue further that the statute is semantically ambiguous because of the punishment provisions found in 18 U.S.C. § 216. Section 216 establishes misdemeanor penalties for "engag[ing] in the conduct constituting the offense," and felony penalties for "willfully engag[ing] in the conduct constituting the offense."[113] These authors point out that "[t]he state of mind term 'willfully' is semantically ambiguous because courts have interpreted it as meaning either a purpose to break the law or simply

---

[109] 162 CONG. REC. S15,954 (daily ed. Nov. 17, 1989) (statement of Sen. Levin).

[110] Fricker & Gilchrist, *supra* note 94, at 847.

[111] *Id.*

[112] *Id.* For illustration, Fricker and Gilchrist offer an interesting factual scenario in which a former employee contacts his former agency to gain information on the specifics of a contract on which that agency is taking bids. The former government employee's firm has not yet made a bid and he does not know if they will. Thus, the former employee, prosecuted under the revised subsection 207(c), could argue that, when he communicated with his former agency, he did not know if his firm would seek official action on the subject of the communication. *Id.* at n.211.

[113] 18 U.S.C. § 216(a)(1)-(2) (Supp. 1990).

knowledge of one's conduct."[114] They conclude with a detailed step-by-step analysis of how to resolve this "gordian knot" of ambiguities.[115]

Whether the mens rea requirement for subsection 207(c) remains ambiguous has yet to be tested in court, because no prosecutions under subsection (c) have occurred since its revision by the 1989 Ethics Reform Act.[116]

H. Be Fruitful and Multiply, and Fill the Earth and Subdue It

The 1989 Ethics Reform Act also amended subsections 207(a) and (b) of the Ethics in Government Act of 1978. They became subsections 207(a)(1) and (2). However, unlike revised subsection (c), they retained the "direct and substantial interest" language that troubled the appellate court in *Nofziger*.

1. *Subsection (a)(1).*—The 1978 version of subsection (a) was amended and became subsection (a)(1). It continued the lifetime ban on former officers and employees communicating with, or appearing before, a United States employee, on behalf of someone else, regarding particular matters in which the individual participated as a government employee and in which the United States is a party or has a direct and substantial interest.[117]

2. *Subsection (a)(2).*—The 1978 version of subsection (b) was amended and became subsection (a)(2). It continued the two-year representational ban on particular matters pending under former officers' or employees' official responsibilities during their last year of government employment, and in which the United States is a party or has a direct and substantial interest.[118]

Undoubtedly, with a desire for both consistency and clarity, Congress chose to clothe amended subsections (a)(1) and (2) with mens rea language mirroring amended subsection (c), thereby clarifying that the terms "knowingly" and "with intent to influence" apply to both the appearance and the communication offense.[119]

---

[114] Fricker & Gilchrist, *supra* note 94, at 848 n.215.

[115] *Id.* at 848–51.

[116] Memorandum from Stephen D. Potts, Director, Office of Government Ethics to Designated Agency Ethics Officials (Nov. 4, 1992) (summarizing conflict of interest prosecutions from Jan. 1, 1990 to Dec. 31, 1991) (on file with author, the SOCO, OTJAG, and the OGE).

[117] *See supra* note 15.

[118] *See supra* note 17.

[119] The pertinent part of revised subsection 207(a) provides:

> (1) Any person who is an officer or employee . . . of the executive branch . . . , and who, after the termination of his or her service or employment . . . , *knowingly makes, with the intent to influence, any*

Subsection (c) does not require, however, that former senior employees know that the particular matters for which they are now lobbying are pending before, or are matters of direct and substantial interest to, their former agency.

The knowledge requirement under subsection (a) should be perfectly clear for two additional reasons. First, because subsection (a)(1) applies to matters "in which the person participated personally and substantially" as a government employee, former employees' knowledge in this situation easily can be inferred from their close association with the subjects.[120] Second, because subsection (a)(2) applies to matters "which [a] person knows or reasonably should know [were] actually pending under [their] official responsibility" during their last year of government employment, the former employees' knowledge in this situation is not only direct but also personal.[121]

Also noteworthy is that subsection (a), as amended, continues to apply, as did the 1978 version of subsections (a) and (b), to all

---

communication to or appearance before any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .) in connection with a particular matter—

(A) in which the United States . . . is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.

(2) Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . , *knowingly makes, with the intent to influence, any communication to or appearance before* any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .), in connection with a particular matter—

(A) in which the United States . . . is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment. . . , and

(C) which involved a specific party or specific parties at the time it was so pending, shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(a) (1992) (emphasis added).

[120] Ethics Reform Act of 1989, *supra* note 20, § 101(a). See Frensilli, *supra* note 64, at 997 n.148.

[121] *Id.*

former executive branch employees, whereas subsection (c) is limited in application to certain former senior officials.[122]

I. But the Work Was Not Finished and There Was No Rest

President Bill Clinton entered the postgovernment revolving door arena immediately after assuming the presidency on January 20, 1993. Like Presidents Kennedy and Carter, President Clinton made postgovernment lobbying an important issue in the presidential campaign. Indeed, his first Executive Order, issued on January 20, 1993, imposed new ethics rules on "senior appointees" in the White House.[123]

The new rules extend to five years the existing one-year ban on lobbying one's own former agency.[124] They also extend the scope of the ban by prohibiting former senior appointees in the Executive Office of the President (EOP)—also for five years after their government employments terminate—from lobbying any officers or employees of any other executive agencies "with respect to which [they] had personal and substantial responsibility as senior appointee[~i]n the EOP."[125] The new rules ban the same senior officials for life from representing foreign governments, but not foreign corporations.[126]

To date, President Clinton has not indicated whether he will propose codifying these new rules, or expand their application to all executive branch officers and employees. To the contrary, transition officials noted, when these new rules were initially proposed for senior White House appointees, that President Clinton would exempt career civil service personnel, foreign service officers, and uniformed military personnel largely because they are career government employees for which "there is no justification for going

---

[122] Ethics Reform Act of 1989, ***supra*** note 20. ***See*** *infra* text accompanying notes 166–72.

[123] Exec. Order No. 12,834, 58 Fed. Reg. 5911 (1993). Section 2(a) of this order defines "senior appointee" as every full-time, noncareer presidential, vice-presidential or agency head appointee in an executive agency whose rate of basic pay is not less than the rate for level V of the Executive Schedule (5 U.S.C. § 5316). It does not include any person appointed as a member of the senior foreign service or solely as a uniformed service commissioned officer. Presidential aides originally thought that these new rules would apply to the top 100 or so "senior appointees" in the White House. These aides now believe the rules will apply only to about 20 very senior people—because the executive order defines the affected individuals in terms of pay grade rather than by title or duties. When President Clinton imposed salary cuts on White House personnel, many "senior appointees" fell below the level V cutoff in the Executive Schedule (currently about $105,000 per year). ***See*** *Salary Cuts Crimp Clinton Ethics Rules*, WASH. POST, Feb. 22, 1993, at **A13.**

[124] Exec. Order No. 12,834, § 1.1, 58 Fed. Reg. 5911 (1993).

[125] *Id.* § 1.2.

[126] *Id.* § 1.3.

beyond the existing law."[127] According to these officials, the new rules affect high-ranking appointees who "could leave government and return to throw their weight around their former agencies," but not lower-level staff personnel "who would have considerable knowledge, but much less influence, to peddle."[128]

J. The Forbidden Fruit—18 U.S.C. § 207 Today

1. Generally.—For DOD officials, as well as all executive branch officers and employees, § 207 now provides a comprehensive series of restrictions on postgovernment employment representational activities that relate directly to both the level and nature of former DOD officials' government service, and to the particular matters on which they worked as DOD officials. These representational restrictions are triggered only if former DOD officials participated personally and substantially in particular matters involving specific parties, or if they had official responsibility for the matters while employed by the government.

Furthermore, the restrictions in § 207 do not bar former government officers or employees from *employment* with defense contractors or other private or public employers after their government employments terminate, regardless of the officials' previous government rank.[129] These restrictions also do not bar postgovernment *employment* that is connected with a particular matter in which the former government officers or employees were involved personally and substantially while employed by the government, or which came under the employees' official responsibility during their last year of government employment.[130] These restrictions bar only certain representational activities, not employment itself, even if the employers do business, or are seeking to do business, with the government.[131]

This makes sense when one considers that § 207's purpose is to prevent the favoritism and undue influence that can result when former officers or employees contact the government on the same matters with which they were connected as government employees. Consequently, the § 207 restrictions do not apply to former DOD officials who are employed in technical or management—that is,

---

[127] *Presidential Transition, Clinton to Require Appointees to Honor Five-Ear Lobbying Ban,* BNA, Dec. 10, 1992, at 238, available in LEXIS, Nexis Library, BNA File. *See also supra* note 123.

[128] Al Kamen & David Von Drehle, *Ethics Policy Toughened; Top Appointees to Face 5-Year Lobbying Curb,* WASH. POST, Dec. 10, 1992, at A1.

[129] Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. § 2637.101(c)(5) (1992).

[130] *Id.*

[131] *Id.*

nonrepresentational—positions that relate to a particular matter in which they participated personally and substantially as government officials, or which came under their official responsibility during their last year of government service.[132] Ethics counselors commonly refer to these types of positions as "in-house" positions because they do not involve contact by the former officials with the government.[133]

2. Today's Restrictions. —Section *207* establishes rules for government officers and employees regarding those situations that "as a matter of law create conflicts of interest and should operate as a deterrent to those who seek to take advantage of their previous relationship" with a government agency.[134] The purpose of this section never has been to prevent all communication between former government employees and their former government agencies; rather, Congress designed it to prevent only those types of communication made by former government employees that seek to improperly influence their former agencies. For example, exchanging holiday and sympathy cards would not be prohibited "communication," nor would social functions such as cocktail parties, so long as these types of communications do not relate to pending matters of business.[135] The restrictions in § **207** also do not bar self-representation.[136]

(a) Subsection 207(a)(1).[137]—This subsection targets former executive branch officers or employees who participate in a matter while employed by the government and then "switch sides" after leaving government service by representing another person on the same matter before the United States. This lifetime restriction begins on the date the individuals terminate their government service. The restriction does not apply unless the individuals, on behalf of someone else, communicate with, or make an appearance before, employees of any United States department, agency, court, or court-martial. Further, the restriction does not prohibit communications with, or appearances before, members of Congress or their legislative staffs.[138]

---

[132] *Id.*

[133] *Id.* § 2637.201(b)(6).

[134] *Post-Employment* ***Lobbying*** *Restrictions:* ***Hearings Before*** *the Subcomm.* ***on Oversight*** *of* ***Government Management of*** *the Senate* ***Comm.*** *on* ***Governmental Affairs,*** 100th Cong., 1st Sess. 43–44 (1987) (statement of Joe Whitley, Deputy Assistant Attorney General, Department of Justice) [hereinafter ***Lobbying Hearings].***

[135] 5 C.F.R. § 2637.201(b)(5) (1992).

[136] Memorandum from Stephen D. Potts, Director, Office of Government Ethics to Designated Agency Ethics Officials 2 (Nov. 5, 1992) (providing written materials to facilitate advice and training under 18 U.S.C. § 207) (on file with author) [hereinafter Potts Memorandum].

[137] *See supra* note 15.

[138] Potts Memorandum, ***supra*** note 136, at 3.

This subsection also does not prohibit former officers or employees from providing "behind-the-scenes" assistance relating to the representation of others. For example, even though former DOD officials cannot telephone, sign their name to a letter addressed to, or attend a meeting with, a government procurement official, former DOD officials legally may tell their employers the name of the DOD employee to call, or to whom to write the letter, or with whom to meet.[139]

The restrictions in this subsection prohibit only those appearances and communications that have the "intent to influence." An "appearance" occurs when the former DOD official is physically present before the United States in either a formal or informal setting, and when the circumstances make it clear that the official's attendance is intended to influence the United States.[140] A "communication'' is broader than an appearance and includes correspondence, in writing or through electronic transmission, and telephone calls.[141] An "intent to influence" the United States occurs when the purpose of the official's appearance or communication is to seek a discretionary government ruling, benefit, approval, or other action, or to influence the government's action in connection with a matter that the former DOD official "knows involves an appreciable element of dispute concerning the particular government action to be taken.''[142]

For subsection (a)(1) to prohibit the appearance or communication, it must involve the same particular matter affecting a specific party in which the former officers or employees participated personally and substantially while employed by the government. "Personally" means directly, and includes merely directing a subordinate to participate.[143] ''Substantially" means that the individual's involvement must be of significance to the matter, or form the basis for a reasonable appearance of significance.[144] "Substantiality" should be based on the importance of the effort, not just on the amount of effort devoted to the matter. While participating in a series of peripheral involvements may be insubstantial, participation in a single, critical step may be substantial.[145] Although Nofziger challenged the terms "personally" and "substantially" as unconstitutionally vague,[146] the trial court disagreed and found these terms to have a

---

[139] 5 C.F.R. § 2637.201(b)(6) (1992).

[140] *Id.* § 2637.201(b)(3).

[141] *Id.*

[142] Potts Memorandum, *supra* note 136, at 3.

[143] 5 C.F.R. § 2637.201(d)(1) (1992).

[144] *Id.*

[145] *Id. See* Potts Memorandum, *supra* note 136, at 4.

[146] United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989), *cert.* denied, 493 U.S. 1003 (1989).

well-understood, common meaning that was supplemented by the OGE in the Code of Federal Regulations (CFR).[147]

The requirement in subsection 207(a)(1) that the prohibition involve a "particular matter involving a specific party" applies both at the time the officers or employees acted in their official governmental capacities, and at the time they are representing someone else after terminating government service. Whether something constitutes the same particular matter depends on the extent to which the matter involves the same basic facts, the time elapsed, the same or related parties, the same confidential or sensitive information, and the continued existence of an important federal interest.[148] A "particular matter" may continue in whole in another form, or in part, and includes any "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, [or] arrest."[149] Stated another way, it covers "the whole range of matters in which the government has an interest."[150] For the representation on the same particular matter to be prohibited, however, the United States must be a party to, or have a direct and substantial interest in, that same matter at the time the former officers or employees make the post-government communications or appearances.[151]

The term "involving a specific party or parties" modifies the term "particular matter" and "narrows it to more discrete and isolatable transactions between specific parties."[152] For example, a draft request for proposal (RFP) becomes a "particular matter involving a specific party or parties" when potential contractors for the proposed project are identified.[153] "Specific party" is not limited to those entities who were parties or potential parties at the time the former officers or employees participated in the matter as government employees; nor is it limited to those parties now desiring representation by the former officers or employees. For this prohibition to apply, a party need only be identified with the particular matter at the time of the individuals' participation as government employees.[154] Whereas contracts always are particular matters involving specific parties, general rulemakings, legislation, and the

---

[147] United States v. Nofziger, No. 87-0309, 1987 U.S. Dist. LEXIS 14134, at *39 (D.D.C. Nov. 10, 1987).

[148] 5 C.F.R. § 2637.201(c)(4) (1992).

[149] *Id.* § 2637.201(c)(1).

[150] S. REP. No. 2213, ***supra*** note 43.

[151] Potts Memorandum, *supra* note 136, at 4.

[152] *See supra* note 69.

[153] *Id.*

[154] *Id.*

formulation of general policy do not normally involve specific parties, even though they may qualify as particular matters.[155] Therefore, former Army officers who were involved personally and substantially in making rules for the Army's environmental program quite possibly—depending on all other facts—could appear before or communicate with the Army on behalf of their postgovernment employers regarding the rule's impact on their employers.[156]

(b) Subsection 207(a)(2).[157]—The restriction in this subsection is identical to the representational restriction in subsection (a)(1), with two exceptions. First, the prohibition lasts for only two years after the former officers or employees terminate government employment, rather than for life; and, second, the prohibition requires only that they have had "official responsibility" for a matter during their last year of government service, rather than personal and substantial participation in the matter.[158] Just as with subsection (a)(1), this subsection prohibits any communication to, and any appearance before, employees of any United States department, agency, court, or court-martial if made with the intent to influence. This two-year representation restriction applies to any matter involving specific parties that were "actually pending" under the former employees' "official responsibilities" at any time within their last year of government service.[159]

The term "actually pending" means that the matters actually were referred to, or under consideration by, persons within the former officers' or employees' areas of responsibility, not merely that they could have been.[160] This two-year restriction applies only if the former officers or employees knew or reasonably should have known at the time of their representation that the matters were under their responsibility during their last year of government service.[161] Title 18, **U.S.C.§ 202,** defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government action."[162] Determining the scope of

---

[155] CACI, Inc. v. United States, 1 Cl. Ct. 352 (1983), *rev'd*, 719 F.2d 1567 (Fed. Cir. 1983) (subsection 207(a) not violated by submission to former agency of contract proposal that did not involve same particular matter in which former government employee had participated personally and substantially).

[156] Potts Memorandum, *supra* note 136, at 4.

[157] *See supra* note 17.

[158] 18 U.S.C. § 207(a)(2) (1962).

[159] *Id.*

[160] 5 C.F.R. § 2637.202(c) (1992).

[161] Potts Memorandum, *supra* note 136, at 5–6.

[162] 18 U.S.C. § 202 (1992). *See* 5 C.F.R. § 2637.202(b)(1) (1992).

''official responsibility" involves looking at the employees' job descriptions or delegations of authority, as well as those areas assigned to them by statute, regulation, or executive order.[163] For example, all particular matters under consideration in an agency fall within the agency head's official responsibility. If subordinate employees actually participate in matters in their official capacity, then those particular matters fall within the official responsibility of the intermediate supervisors responsible for the subordinate employees.[164] Even if employees are able to disqualify themselves from further participation in the matters, the matters continue to remain under their official responsibility.[165]

(c) ***Subsection 207(c).***[166]—This subsection applies only to ''senior" employees. Generally, personnel whose pay grades fall within the Executive Schedule, Senior Executive Service, or general or flag officer rank in the active duty military are senior employees.[167] The restriction in this subsection is a one-year restriction that begins when the employees cease to be "senior" employees, not when the employees leave government service, unless the two conditions occur simultaneously.[168] Like the lifetime restriction in subsection (a)(1), this subsection prohibits appearances before, and communications with, the United States but does not prohibit "behind-the-scenes" or "in-house" assistance. Congress designed it to serve as a "cooling off" period to prevent any appearance that former senior employees are able to influence government decisions improperly because of their former senior positions.[169]

Subsection (c) is broader than the lifetime restriction in subsection (a)(1) in that no requirement exists for former senior employees to have participated personally and substantially in the matters that are the subject of the postgovernment employment appearances or communications. Alternatively, subsection (c) is narrower than the lifetime restriction because it prohibits only appearances before, or communications with, employees of government agencies in which the former senior employees served during their last year in senior positions, rather than all executive branch agencies.[170] This representational bar applies to any matter, whether or not involving spe-

---

[163] 5 C.F.R. § 2637.202(b)(2) (1962).

[164] *Id.*

[165] Potts Memorandum, *supra* note 136, at 5.

[166] *See supra* note 18.

[167] Post-Employment Conflict of Interest Restrictions, 5 C.F.R. § 2641.101 (1992).

[168] Potts Memorandum, *supra* note 136, at 8.

[169] *Id.*

[170] 18 U.S.C. § 207(c) (1992).

cific parties, in which the former senior employees seek official action by current government employees on behalf of someone else.[171]

The restrictions in subsections (a) and (c) do not apply to communications made solely for the purpose of furnishing scientific or technological information.[172] This exemption allows the free exchange of this information to keep the government informed of the significance of scientific and technological alternatives.

3. *Congressional Intent.*—Today's **§ 207,** as amended by the **1989** Ethics Reform Act,[173] received extensive consideration in two consecutive Congresses. According to Senator Levin, the primary sponsor of the **1989** Ethics Reform Act, **§ 207** now "constitutes Congress's carefully considered judgment as to the appropriate limitation on contacts between former government officials and their old offices."[174]

In recognition of **§ 207's** government-wide application and its restrictions on postgovernment employment activities, several members of Congress listened to, and deemed legitimate, the complaints of contractors and federal officials that other statutes restricting postgovernment employment and employment activities unnecessarily duplicated the purpose of **§ 207.** Throughout **1990** and **1991,** Congress considered several bills intended to reform procurement integrity laws and streamline the various overlapping statutes affecting the postgovernment employment activities of DOD personnel.[175] A tentative House-Senate compromise bill proposed repealing the DOD-unique selling statutes. The same bill, however, purported to expand the application of postgovernment employment restrictions to contract administration personnel while eliminating the "majority of working days"[176] language of **10** U.S.C. **§ 2397b.** The

---

[171] Potts Memorandum, supra note 136, at 8.

[172] 18 U.S.C. § 207(j)(5) (1992). See 5 C.F.R. § 2637.206(a)-(c) (1992).

[173] *See supra* note 20.

[174] *Government* Contracts, *Senate* **Approves** *Comprehensive Rewrite* of Procurement Ethics *Laws*, BNA, Aug. 6, 1991, at A-2, available in **LEXIS,** Nexis Library, BNA File [hereinafter *Procurement Rewrite*].

[175] *See* Contract Policy, *Roth* Reintroduces Procurement Integrity *Reform* Bill, *Senate* Hearings *Scheduled*, BNA, Feb. 25, 1991, at A-17, available in **LEXIS,** Nexis Library, BNA File [hereinafter *Procurement Reform* Bill]; Defense, *Mavroules* **to** Offer **Revolving** *Door Amendment* **to** DOD Bill, BNA, May 13, 1991, at A-8, available in **LEXIS,** Nexis Library, BNA File [hereinafter Revolving *Door Amendment*]; Procurement *Rewrite*, supra note 171.

[176] "Majority of working days" is a term used in determining whether the restrictions in 10 U.S.C. § 2397b will apply to former officers or employees involved in procurement-related activities for the government. See *infra* text accompanying notes 272–93. See also note 290.

DOD General Counsel's office found the latter provisions, introduced late in the negotiations by Representative Nicholas Mavroules (D-Mass.), Chairman of the House Armed Services Investigations Subcommittee, unacceptable and voiced opposition to the bill, which then died.[177]

Accordingly, despite two years of extensive efforts by Congress and executive branch officials, the postgovernment employment provisions of 41 U.S.C. § 423, and the DOD-unique restrictions in 10 U.S.C. § 2397, 18 U.S.C. § 281, and 37 U.S.C. § 801(b), remain in effect.

IV. Reforming the Twilight Zone

> What thou avoidest suffering thyself seek not to impose on others.[178]

A. Rubik's Cube

Congress should repeal the three conflict of interest statutes that specifically target DOD officials and their postgovernment employment with DOD contractors.[179] Congress also should repeal the executive branch-wide, postgovernment employment restrictions in 41 U.S.C. § 423(f). This action not only would reduce the multiple, and oftentimes unintelligible, layers of overlapping restrictions that burden the DOD ethics program, but also would eliminate the unfairness of burdening retired DOD officials—and in particular retired military officers—with additional layers of restrictions that do not apply to other executive branch officers and employees.

Currently, retired regular military officers must steer their postgovernment employment conduct through at least three conflict of interest statutes.[180] This increases to four statutes181 if they served as procurement officials within the two years prior to retirement. It increases to five statutes182 if they held a certain rank and were involved in any procurement-related activities within the two years prior to retirement.

Former, rather than retired, military officers need to be con-

---

[177] *Government Contracts, Pentagon Forces Negotiators to Drop Procurement Integrity Terms* from *DOD Bill,* BNA, Nov. 8, 1991, at A-16, *available in* LEXIS, Nexis Library, BNA File [hereinafter *Pentagon Forces].*

[178] EPICTETUS, ENCHEIRIDION *(c.*100).

[179] 10 U.S.C. §§ 2397, 2397a, 2397b, 2397c; 18 U.S.C. § 281; 37 U.S.C. § 801(b).

[180] 18 U.S.C. §§ 207, 281; 37 U.S.C. § 801(b).

[181] The fourth statute is 41 U.S.C. § 423(f).

[182] The fifth statute is 10 U.S.C. § 2397b.

cerned about only one statute in general,[183] which increases to two statutes if they served as procurement officials during their last two years of government service.[184] This again increases to three statutes[185] if they held a certain rank and were involved in procurement-related activities during their last two years of government service.

Former and retired DOD civilian officers and employees need to steer their postgovernment employment conduct through at least one statute,[186] which increases to two statutes[187] if they served as procurement officials during their last two years of government service. This increases to three statutes[188] if they held a certain rank and were involved in procurement-related activities during their last two years of government service.

This statutory labyrinth is somewhat overwhelming to the average DOD official. Postgovernment employment restrictions should be part of a "fair and understandable system" for both the former DOD official "whose activity must be fairly restricted, and for the public who rightfully demands tough enforcement of laws."[189] Nevertheless, former DOD officials, through the far-reaching restrictions in these laws, presently are branded as scofflaws or scofflaws-in-waiting before they even have begun to seek postgovernment employment. The best example of this point is the onerous two-year criminal selling statute, 18 U.S.C. § 281, which prohibits retired military officers from selling anything to the department from which they retired for two years after retiring, regardless of the officers' rank or potential for improper influence, or whether any nexus whatsoever exists between their former military duties and what they now wish to sell. This broad restriction is patently unfair and discriminatory, especially because no parallel statute exits for executive branch officials in the nonuniformed services. Congress needs to reconsider the value of this overlapping "deterrence" when no nexus to any true conflict of interest exists. Mr. Joe D. Whitley, Deputy Assistant Attorney General, Department of Justice, addressed this "deterrence" in testimony before a Senate subcommittee on 18 U.S.C. § 207, stating as follows:

> [T]his deterrence . . . should be weighed against the best interests of society to encourage its citizens to work in

---

[183] 18 U.S.C. § 207.

[184] The second statute is 41 U.S.C. § 423(f).

[185] The third statute is 10 U.S.C. § 2397b.

[186] 18 U.S.C. § 207.

[187] The second statute is 41 U.S.C. § 423(f).

[188] The third statute is 10 U.S.C. § 2397b.

[189] *Lobbying* ***Hearings,*** *supra* note 134, at 4 (statement of Sen. Levin).

> Government and to consider such service an honor and a privilege, and at the same time not to punish them with unreasonable penalties unrelated to any genuine conflict of interest on their leaving Government for other employment.[190]

The philosophy behind § 207—that is, deterrence with fairness—illustrates why the DOD-unique postgovernment employment statutes should be repealed, and why the postgovernment employment restrictions in 41 U.S.C. § 423(f) are no longer necessary. Perpetuating the prohibitions in these statutes, which cover similar conduct, but which apply different restrictions to limited classes of former DOD officials, is at odds with the comprehensive purpose and structure of the 1989 Ethics Reform Act.[191] A quote from the subcommittee hearings on the 1989 Ethics Reform Act exemplifies the quandry in which former DOD officials find themselves on leaving government service. Although the senators speaking were referring to 18 U.S.C. § 207(c) before its amendment by the 1989 Ethics Reform Act, their comments are apropos to the four statutes at issue:

> Sen. Levin. I will be putting this in the record now [referring to a subcommittee flowchart that helps determine who 207(c) applies to].
>
> Sen. Stevens. I read that.
>
> Sen. Levin. Did you? Just to show how complicated this is.
>
> Sen. Stevens. At first I thought they had lost their minds, but then I understood it. [Laughter.]
>
> Sen. Levin. This could almost be right out of Dickens. This is a chart of questions you have to ask yourself when you leave the government as to whether you are covered or not. First of all . . . you've got to ask a question, and if the answer is "Yes", then you've got to ask another question. If the answer is "Yes", you've got to ask another question. I mean, that is a Rubik's Cube, and it is not solvable by an awful lot of people.[192]

B. Procurement Integrity Postgovernment Employment Restrictions

1. Generally.—What commonly is referred to as the Procurement Integrity Act, codified at 41 U.S.C. § 423, began as the "pro-

---

[190] *Id.* at **44** (statement **of** Joe Whitley).

[191] 136 Cong. Rec. S8546.

[192] *Lobbying* ***Hearings,*** *supra* note **134,** at **16.**

curement integrity" section of the Office of Federal Procurement Policy Reauthorization Bill. This bill created section 27 of the Office of Federal Procurement Policy Act Amendments of 1988.[193] Congress passed the Procurement Integrity Act on November 17, 1988. Interestingly, the new restrictions that the Act imposed on postgovernment employment activities caused many senior and essential federal officials to resign to escape the Act's far-reaching grasp. Congress was forced, therefore, to delay its effective date to study it at greater length.[194] The Procurement Integrity Act finally became effective 240 days later,[195] but was suspended within six months of its effective date for a period of one year by the same law that also amended it—the 1989 Ethics Reform Act.[196] Despite its rocky start, the Procurement Integrity Act survived and currently is in effect, even though the Administration and Congress have made several efforts to repeal portions of it, including its postgovernment employment provisions.

The Procurement Integrity Act's purpose, among other things, was to restrict the postgovernment employment activities of certain former executive branch personnel to protect against favoritism in the government's procurement process.[197] Its legislative purpose

---

[193] Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6, 102 Stat. 4063, 41 U.S.C. § 402 (1988).

[194] United States v. Boeing, 845 F.2d 476 n.20 (4th Cir.) (No. 88-931), *rev'd*, 494 U.S. 152 (1990) (brief of Lawrence H. Crandon); ***see*** H.R. REP. No. 748, 87th Cong., 1st Sess. (1961). When President Ronald Reagan vetoed the "Post-Employment Restrictions Act of 1988", H.R. 5043, 100th Cong., 2d Sess. (1988), he noted that, "It is already difficult to recruit talented people into the senior ranks of government," and regarding the proliferation of new ethics laws, "[m]any of the most talented might never sign up to serve their country, and the country would be the worse for it." President's Memorandum of Disapproval, 24 WEEKLY COMP. PRES. Doc. 1561 (Nov. 23, 1988).

[195] Originally, the "Procurement Integrity Act" was to take effect 30 days after its passage; ***see*** H.R. REP. No. 911, 100th Cong., 2d Sess. (1988). Congress extended the effective date however, to take effect 180 days after the date of the Act's enactment; furthermore, the Act was to apply only to conduct that occurred on or after May 16, 1989. The effective date was extended again, for 60 additional days, to accommodate complaints from various executive branch agencies—such as the Office of Management and Budget, the DOD, and defense contractors—who complained that they needed more time to digest and implement the Act's numerous administrative requirements; see 135 CONG. REC. H1876 (daily ed. May 15, 1989).

Interestingly, the Act was only in effect for approximately six months when the Ethics Reform Act of 1989, § 506(d) suspended it; ***see*** *supra* note 20. This suspension, which lasted for one year following the date the Reform Act was enacted—until 1 December 1990—resulted from President George Bush's dislike of the Procurement Integrity Act and the worries of several members of Congress that the Procurement Integrity Act conflicted with existing conflict of interest laws; see 134 CONG. REC. S15,962 (1988) (daily ed. Nov. 17, 1989). ***See*** *also* Donaldson, *supra* note 1, at n.7.

[196] ***See*** *supra* note 20.

[197] Because Congress hurriedly passed, before its imminent adjournment, the Procurement Integrity Act, no joint House-Senate legislative history was drafted in time to accompany the Act. Only comments from certain members of Congress are

was to "break the back of the old-boy network" in which government personnel gave "information and favors" to contractors in exchange for "promises for future employment opportunities."[198] The Act also provides for contractual, administrative, civil, and criminal penalties for violating its various provisions.[199]

Since the Procurement Integrity Act's enactment, however, many parties have questioned its necessity.[200] Members of the private sector criticized it as "unnecessary, redundant, and counterproductive, due to the tremendous amount of legislation already in effect governing ethical conduct."[201] A General Accounting Office (GAO) survey of industry and government acquisition officials opined that Congress "should concentrate on making the law less complicated and easier to understand rather than . . . adding to the patchwork of existing procurement laws."[202] Notwithstanding these criticisms and the argument that Congress should examine the inadequacies of existing laws before passing more laws, Congress enacted the Procurement Integrity Act as a "noble cause."[203] This occurred despite the findings in 1986 by the President's Blue Ribbon Commission on Defense Management—known as the Packard Commission—that "the nation's defense programs lose far more to inefficient procedures than to fraud and dishonesty. The truly costly problems are . . . overcomplicated organization and rigid procedure, not avarice or connivance."[204]

---

available. For example, Senator John Glenn (D-Ohio) attached to his statement in the *Congressional Record* for October 20, 1988, a section-by-section analysis of section 6 of the Act. However, Representative Jack Brooks (D-Tex.), Chairman of the House of Representatives Government Operations Committee and a sponsor of the Act, stated that Senator Glenn's analysis, which was the only joint analysis produced by the Senate with respect to section 6, was "extraneous" to the words of the bill. *See* 134 CONG. REC. H10,611 (daily ed. Oct. **20,** 1989); *see also* Stephen M. Ryan, *The History of the Troubled "Procurement Integrity" Statute* V-11 n. 16(1990), a paper presented at a seminar held at The Judge Advocate General's School's 1993 Government Contract Law Symposium, at Charlottesville, Virginia (Jan. 12, 1993) (Mr. Ryan is an attorney with Brand & Lowell, P.C., Washington, D.C.) (on file at the law library at The Judge Advocate General's School) [hereinafter Ryan Paper].

[198] 134 CONG. REC. S17,071 (daily ed. Oct. 20, 1988) (statement of Sen. Glenn).

[199] 41 U.S.C. § 423 (g)-(j) (1992).

[200] *To Extend the Authorization of Appropriations for the Office of Federal Procurement Policy: Hearings on H.R. **3345** Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 100th Cong., 1st Sess. 199–200 (1987) (letter from Albert D. Bourland, Vice-president of Congressional Relations, United States Chamber of Commerce, to Representative Jack Brooks, Chairman of the House Committee on Government Operations).

[201] Donaldson, *supra* note 1, at 424.

[202] *Id.* at 428, 438 n.29.

[203] *Id.*

[204] *Id.* at 445 n. 108. *See* PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT 44 (June 1986) (Summary) (chaired by David Packard, Hewlett-Packard Company founder); *see also* %

2. Prohibitions.—Title 41, United States Code, § 423(f) delineates the Act's restrictions on postgovernment employment. This subsection was the first government-wide[205] revolving door provision targeted specifically at procurement conduct.[206] It imposes two basic restrictions on employees who leave federal service. First, former procurement officials[207] may not participate in any manner on behalf of competing contractors in any negotiations leading to the award or modification of contracts for such procurement. Second, former procurement officials also may not participate personally and substantially on behalf of competing contractors in the performance of such contracts.[208] Both restrictions apply for two years[209] from the date of the former procurement officials' last personal and substantial participation[210] in the procurements on behalf of the government. Subsection 423(f) does not statutorily preclude individuals from being employed by the successful competing contractors; it only excludes employment activities relating to the particular procurements in which the individuals participated.[211]

These two restrictions also apply to former procurement officials' postgovernment employment activities on behalf of some subcontractors. They generally do not apply if the subcontract amount is less than $100,000 or if the participation is on behalf of subcontractors below the second tier.[212] The restrictions do apply, however, regardless of dollar value and at any tier, if the subcontractors on whose behalf the individuals are now participating significantly assisted the prime contractors in negotiating the prime contracts. They also apply if the individuals, while serving as government

---

Acquisition Findings in the Report of the President's Blue Ribbon Commission on Defense Management: Hearings on S. 3082, *S. 2151 Before* the Subcomm. on Defense Acquisition Policy of the Comm. on *Armed* Services, 99th Cong., 2d Sess. 30–40 (1986) (statements of Packard Commission members David Packard, Dr. William Perry, and Jaques S. Gansler).

[205] Unlike 41 U.S.C. § 423(f), which applies government-wide, 10 U.S.C. § 2397b targets only the procurement-related activities of DOD personnel.

[206] Ryan Paper, supra note 197, at V-13.

[207] The Procurement Integrity Act applies to W D officers, employees, and enlisted members if they served as procurement officials, as defined in the statute. *See supra* note 22.

[208] Memorandum, Army Standards of Conduct Office (SOCO), Office of the Judge Advocate General (OTJAG), DAJA-SC, subject: Ethics Under the Procurement Integrity Act (1 Oct. 1992) [hereinafter Army Ethics Memorandum].

[209] The original House bill provided for a three-year, rather than a two-year, bar. See H.R. 3345, 100th Cong., 2d Sess. (1988); 134 CONG. REC. H7426 (1988).

[210] The Procurement Integrity Act defines the term "personal and substantial participation" as it is defined under 18 U.S.C. § 207. See supra text accompanying notes 137–56. See also *supra* note 143.

[211] Ryan Paper, supra note 197, at V-13.

[212] Army Ethics Memorandum, supra note 208.

employees, recommended the particular subcontractors to the prime contractors as sources.[213]

Although they do not regulate postgovernment employment conduct, subsections 423(a)(1) and (b)(1) are important to this discussion because they both regulate the conduct of procurement officials who seek postgovernment employment with competing contractors. Subsection (a)(1)[214] prohibits competing contractors from discussing, offering, or promising future employment to government procurement officials during the conduct of a procurement. Subsection (b)(1)[215] is a mirror image in reverse, in that it prohibits government procurement officials from soliciting or accepting future employment discussions or promises from competing contractors during the conduct of a procurement, absent a proper recusal under subsection (c).[216] The Procurement Integrity Act does not prohibit employment

---

[213] *Id.*

[214] The pertinent part of subsection 423(a) provides:

> During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent or consultant of any competing contractor shall knowingly—
>
> (1) make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in subsection (c).

41 U.S.C. § 423(a)(1) (1992).

[215] *See supra* note 21.

[216] The pertinent part of subsection 423(c) provides:

> (1) A procurement official may engage in a discussion with a competing contractor that is otherwise prohibited by subsection (b)(1) if, before engaging in such discussion—
>
> (A) the procurement official proposes in writing to disqualify himself from the conduct of any procurement relating to the competing contractor (i) for any period during which future employment or business opportunities for such procurement official with such competing contractor have not been rejected by either the procurement official or the competing contractor, and (ii) if determined to be necessary by the head of such procuring official's procuring activity . . .; and
>
> (B) the head of that procuring activity of such procurement official . . . , after consultation with the appropriate designated agency ethics official, approves in writing the recusal of the procurement official.
>
> (2) A procurement official who, during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract, has participated personally and substantially in the evaluation of bids or proposals, selection of sources, or conduct of negotiations in connection with such solicitation and contract may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.
>
> (3) A procurement official who, during the period beginning with the negotiation of a modification or extension of a contract and ending with—
>
> (A) an agreement to modify or extend the contract, or

negotiations between procurement officials and competing contractors once the "conduct of the procurement" has ended—that is, once the contract has been awarded, modified,[217] or extended.

Interestingly, subsections (a)(1) and (b)(1) can be violated even though no evidence of a "nexus to an official act" or intent to influence exists.[218] This is possible because these elements of nexus or intent are not needed to impose administrative or civil remedies provided for by the statute.

3. *Reform.*—Criminal statute 18 U.S.C. § 207 also prohibits the type of conduct proscribed by subsection 423(f). The 1989 Ethics Reform Act[219] amended § 207 to establish a "single, comprehensive, postemployment statute applicable to former executive and legislative branch personnel."[220] The restriction in subsection 207(a)(1) is a permanent, lifetime bar that prohibits former officers and employees who participated personally and substantially in a "procurement"[221]—that is, a particular matter[222]—from representing any other person before a department or agency of the United States in connection with that same procurement or contract.

In March 1989, President George Bush recognized this overlap in proscribed conduct and proposed repealing the postgovernment employment restrictions in subsection 423(f). A federal advisory commission that he had appointed previously to study a wide range of ethics issues also recommended that the postgovernment employment restrictions in the Procurement Integrity Act be repealed.[223] The need for this repeal was underscored further by the announcements of several administration officials that they were leaving gov-

---

(B) a decision not to modify or extend the contract,

has participated personally and substantially in the evaluation of a proposed modification or extension or the conduct of negotiations may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

41 U.S.C. § 423(c)(1)-(3) (1992).

[217] A "modification" means the addition of new work to a contract, or the extension of a contract, which requires a justification and approval. It does not include an option where all the terms of the option, including option prices, are set forth in the contract and all requirements for option exercise have been satisfied, change orders, administrative changes, or any other contract changes that are within the scope of the contract. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 3.104-4(e) (1 Apr. 1984) [hereinafter FAR].

[218] Donaldson, *supra* note 1, at 425, 440 n.47.

[219] *See supra* note 20.

[220] 136 CONG. REC. S8547.

[221] *Id.*

[222] 18 U.S.C § 207(a)(1) (1992).

[223] The report was titled, *"To Serve With Honor; [The] Report of the President's Commission on Ethics* Law *Reform; Report and Recommendations to* the *President* 66 (1989), *reprinted in* Ryan Paper, *supra* note 197, at V-15.

ernment service to avoid the Act's postgovernment employment restrictions. This prompted *Wall Street Journal* editorial writers to note, with respect to the Act, "The problem is clear. Congress amended the Federal Procurement Policy Act to create a huge new list of forbidden activities," which the *Journal* further labeled as the "typically vague products of today's sloppy legislative drafting."[224]

Given that 18 U.S.C. § 207 is a government-wide, postgovernment employment statute recently fine-tuned in the areas of improper use of influence, no need exists to statutorily impose other postgovernment employment restrictions on procurement personnel that are more onerous than those imposed on other government employees whose actions may have an equally significant or even greater impact on potential employers.[225] For example, the restriction in subsection 423(f) against performing work under a contract unnecessarily prohibits conduct that poses no "potential for abuse of former positions."[226] The proscribed conduct does not involve contacts with former government associates, and source selection and bid proposal information lose their importance with respect to a procurement once the contract has been awarded to a particular company. Furthermore, § 207 would prohibit the situation in which former government procurement officials, after contract award and during contract performance, contacted their former government colleagues in an attempt to persuade them to overlook a contract requirement or to approve and provide an advance payment before completion of the required work. This is because the individuals' contacts would constitute prohibited representation on particular matters in which they participated personally and substantially. If these individuals have not participated personally and substantially in the procurement, and are not senior officials under subsection 207(c), then the opportunity for improper influence is not likely to arise.

To proscribe work under a contract also makes no sense because, after a contract has been awarded, both the contractor and the government have a "shared interest" in the contract's successful performance.[227] The efforts of former government employees devoted to such an endeavor are in the government's best interest.

Although the second restriction in subsection 423(f) against participating in negotiations helps to ensure that the government's procurement-sensitive information remains protected, the restriction is unnecessary because such unauthorized disclosure already is

---

[224] Ryan Paper, supra note 197, at V-22.

[225] 136 CONG. REC. S8647.

[226] *Id.*

[227] *Id.*

prohibited by subsections 423(b)(3),[228] (d),[229] and (e)(4).[230] Furthermore, administrative,[231] civil,[232] criminal,[233] and contractual[234] penalties are available for violations of these subsections. For example, if procurement officials properly disqualify themselves from agency procurements in accordance with subsection 423(c), negotiate for employment with contractors competing for such procurement, begin employment with those competing contractors, and improperly disclose proprietary or source selection information during the pendency of the procurements, those individuals will have violated subsections 423(d) and (e)(4), which authorize administrative remedies and civil penalties.

Accordingly, the two-year restrictions in subsection 423(f) overlap with 18 U.S.C. § 207 and unnecessarily add a second, third, and possibly fourth layer of postgovernment employment restrictions on former government procurement officials. Additional subsection 423 provisions remedy unauthorized disclosure of proprietary or source selection information during the conduct of agency procurements by former government employees who obtain employment with competing contractors. Additionally, proprietary and source

---

[228] The pertinent part of subsection 423(b) provides:

> During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—
>
> (3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

41 U.S.C. § 423(b)(3) (1992).

[229] Subsection 423(d) provides:

> During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

41 U.S.C. § 423(d) (1992).

[230] The pertinent part of subsection 423(e)(4) provides: "If a procurement official leaves the Government during the conduct of such a procurement, such official shall certify that he or she understands the continuing obligation not to disclose proprietary or source selection information." *Id.* § 423(e)(4) (1992).

[231] Title 41, United States Code, § 423(h) provides for administrative penalties for violations of subsections 423(b), (d), or (e).

[232] Title 41, United States Code § 423(i) provides for civil penalties for violations of subsections 423(a), (b), (d), or (f).

[233] Title 41, United States Code § 423(j) provides for criminal penalties for, among other things, knowingly and willfully disclosing proprietary or source selection information during the conduct of a procurement.

[234] Title 41, United States Code § 423(g) provides for contractual penalties for conduct by a competing contractor that violates subsection 423(a).

selection information loses its importance with respect to a procurement once a contract has been awarded; and the government's interest is advanced by the contract being performed successfully by former government employees who are familiar with the procurements and the government's needs. The multiple restrictions in subsection 423(f) are counterproductive and add unnecessary complexity to an already crowded matrix of restrictions. Moreover, these multiple restrictions come at a high cost to executive branch efforts to administer a meaningful, intelligible, and workable ethics program.[235]

Even Congress was forced to recognize, albeit belatedly, the complexity of the postgovernment employment restrictions in subsection 423(f). In 1989, Congress amended § 27 by adding a new subsection (k).[236] This new subsection, entitled "Ethics Advice," requires agency ethics officials, on request, to provide procurement officials with written "safe harbor" opinions as to whether § 423 precludes these officials from engaging in certain activities, such as negotiating for employment, or accepting postgovernment employment, with competing contractors.[237]

Subsection 423(k) is a patent indictment of congressional failure in the ethics arena. As a matter of principle, ethics, or "safe harbor" opinions, which supposedly serve to protect requesting officials from sanctions if they fully disclose their situations and then follow the ethics advice they receive, should be unnecessary. Ethics laws, to include those imposing postgovernment employment and employment activity restrictions, should be straightforward, thereby enabling employees of reasonable intelligence and experience to understand and comply with them without having to obtain written legal opinions to "protect" them.[238]

Although the Procurement Integrity Act was prompted in part by the 1988 criminal scandal concerning DOD contracting practices known as Operation Ill-Wind,[239] none of the individuals and companies involved in the Ill-Wind indictments, pleas, and prosecutions

---

[235] 136 CONG. REC. S8547 (daily ed. June 21, 1990).

[236] Defense Authorization Act for 1990 & 1991, Pub. L. No. 101-189, § 814(a)(3), 1989 U.S.C.C.A.N. (103 Stat.) 1496.

[237] 41 U.S.C. § 423(k) (1992). ***See*** 136 CONG. REC. S8547 (daily ed. June 21, 1990).

[238] *Id.* at S8548.

[239] "Operation Ill-Wind" was the Federal Bureau of Investigation's (FBI) code name for the criminal investigation of the DOD contracting program. Front page newspaper reports in June, 1988 led the public and members of Congress to believe that the DOD procurement program was replete with corruption. Public opinion polls—taken soon after the investigation became public knowledge—demonstrated that Americans were angered by and disgusted with the government's contracting system. Such public opinion is a powerful stimulus for "reform." ***See*** Ryan Paper, *supra* note 197, at **V-4.**

had engaged in conduct that would have violated the restrictions in subsection 423(f). This is significant. Senator Levin even recognized that "there is no indication that, after leaving government service, any individual performed work under a contract or assisted a competing contractor in negotiations leading to the award of a contract on which he had participated during government service."[240]

Congress should repeal 41 U.S.C. § 423(f) as an unnecessary and duplicative prohibition on conduct already proscribed by 18 U.S.C. § 207. That § 423(f) currently applies to enlisted members of the uniformed services, while § 207 does not, is not sufficient reason—in and of itself—to retain § 423(f) and all of its baggage. Congress simply should amend § 207 to make it apply to those enlisted members who serve as procurement officials for the government.

C. Reporting Requirements and Postgovernment Employment Bars Under 10 U.S.C. § 2397-2397c

As previously outlined, 10 U.S.C. § 2397 through 2397c is a revolving door statute targeted specifically at certain DOD officials and their postgovernment employment arrangements with defense contractors. The restrictions on seeking employment imposed by § 2397a, and the postgovernment employment prohibitions contained in § 2397b, should be repealed because their purposes duplicate the revolving door restrictions that already apply to all executive branch officers and employees under 18 U.S.C. §§ 207 and 208(a). The postgovernment employment reporting requirements contained in § 2397 and 2397c also should be repealed because they impose unnecessary and administratively difficult procedural requirements on the DOD ethics program that do not contribute positively to enforcing the postgovernment employment prohibitions in § 2397b.[241]

1. Reporting Requirements in Section 2397 through 2397c

(a) Generally.—Experience seems to indicate that the public always has been concerned about the potential for DOD officials to improperly use their official positions to curry favor with defense contractors to secure potential future employment. Department of Defense officials, especially career military officers, often leave government service well prepared for business. They "know how to work in the close quarters of a corporate environment and talk in terms of either strategy or tactics against the 'enemy,' their former employer, or their customers as the case may be."[242] Accordingly,

---

[240] 136 CONG. REC. S8547 (daily ed. June 21, 1990).

[241] *Id.* at S8546.

[242] GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION, CHAPTER 3: IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST, SECTION 3.1, ETHICS IN CONTRACTING (1986).

Congress imposed reporting requirements on certain former DOD officials (§ 2397) and major defense contractors (§ 2397c).

The reporting requirements imposed on former DOD officials began in 1969 and initially were codified at 50 U.S.C. § 1436.[243] These reporting requirements later were amended and became 10 U.S.C. § 2397.[244] Today, § 2397 requires former DOD officials—0-4 and GS-13 and above—to file reports if they are employed by a major defense contractor at an annual pay rate of at least $25,000 within two years after leaving the DOD.[245] These reports must include information: **(1)** the individuals' current duties; (2) their former duties while employed by DOD; **(3)** the extent to which their former official DOD duties required them to perform work for these particular defense contractors; and, (4) the nature of any disqualification actions taken during their last two years of government service.[246]

The reporting requirements imposed on major defense contractors—for purposes here, those awarded one or more DOD contracts aggregating at least $10 million in the preceding fiscal year[247]—began with the Defense Acquisition Improvement Act of 1986, which added a new § 2397c.[248] Section 2397c, a corollary to § 2397, requires major defense contractors to submit annual reports to the DOD identifying former DOD officials who received compensation from the contractor within two years after leaving the DOD.[249]

(b) Reform.—Sections 2397 and 2397c serve only to encumber the DOD ethics program by singling out certain DOD officials and defense contractors with requirements to file reports that are not imposed on officials and contractors of other executive

---

[243] Act of November 19, 1969, Pub. L. No. 91-121, 1969 U.S.C.C.A.N. (83 Stat.) 237 (codified at 50 U.S.C. § 1436).

[244] Technical Amendments Act of October 12, 1982, Pub. L. No. 97-925, 1982 U.S.C.C.A.N. (96 Stat.) 1291 (codified at 10 U.S.C. 2397).

[245] Former employees meet these reporting requirements through the completion and filing with the DOD of *Department of Defense Form* (DD Form) 1787, Report of DOD and Defense Related Employment. Department of Defense 5500.7-R, JER, Aug. 30, 1993, ch. 7, § 4.

[246] 10 U.S.C. § 2397(b)(3) (1992).

[247] *Id.* § 2397c(b)(1)(A).

[248] Defense Acquisition Improvement Act of 1986, Pub. L. No. 99-951, 1986 U.S.C.C.A.N. (100 Stat.) 5627. The reporting requirement for defense contractors began in a package of procurement-related provisions offered during the defense acquisition policy subcommittee [of the Senate Armed Services Committee] markup of the 1986 defense authorization measure [S. 674]. Then-Senator Dan Quayle (R-Ind.), the subcommittee chairman, offered the package. Senator Quayle's provision required defense contractors to report to the DOD regarding any employee who, within the past two years, was employed by the DOD and who had substantial responsibility for contracts with that contractor. ***See*** *Revolving Door Provision Included in* ***Senate*** *Panel's Markup of* ***Defense*** *Bill*, BNA, Apr. 4, 1985, at A-19, *available in* LEXIS, Nexis Library, BNA File [hereinafter *Revolving Door Provision]*.

[249] 10 U.S.C. § 2397c(b)(1)(A)-(B) (1992).

branch agencies. This "differential treatment is at odds with congressional and administration efforts to provide uniformity in ethical standards that apply throughout the executive branch."[250] Although the reports from both former DOD officials and contractors are filed with the DOD, they have "not proved to be of value" in enforcing any conflict of interest restrictions.[251] Interestingly, the only basis for initiating action under either of these two sections has been for failure to file the reports themselves, rather than for violating any other restriction.[252]

Additionally, the volume of reports that the DOD—and the headquarters of each military department—receives, analyzes, and seeks clarification on because of faulty or unclear information creates an unnecessary administrative burden that is time- and resource-intensive without any sort of positive remuneration. In 1990, the GAO estimated that compliance by former DOD officials with the filing requirements imposed by § 2397 was as low as thirty percent.[253] This low compliance rate required DOD and military department ethics counselors to set aside their primary duties while they attempted to contact thousands of nonfilers.[254] Thus, the official duty time and personnel efforts spent on administering this program is a major commitment of resources. Ethics counselors could employ these resources more productively by using this time and effort to provide ethics advice and training. The justification to repeal this reporting requirement becomes more persuasive in light of the reports' failure to prove its value to the administration of the DOD's ethics program.[255]

Recently, Congress questioned the continuing need for these reports. A staff analysis prepared for the House Armed Services Subcommittee on Investigations, chaired by Representative Nicholas Mavroules (D-Mass.), recognized that the "purpose of the reporting requirement is not clear," and that because those not complying with the requirements are not likely to file accurate reports or to file reports at all, "the reports are really of no value" without a costly administrative system for follow up.[256]

The reporting requirements that § 2397 and § 2397c impose

---

[250] 136 CONG. REC. S8549.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Mavroules to Offer Revolving Door Amendment to DOD Bill*, BNA, May 13, 1991, at A-8, *available in* LEXIS, Nexis Library, BNA File [hereinafter *Mavroules Amendment*].

provide no benefit and serve only to administratively burden the DOD ethics program. Consequently, Congress should repeal them.

2. Requirements Relating to Contacts Under Section 2397a

(a) Generally.—Section 2397a[257] applies to certain DOD officials—0-4 and GS-11 and above[258]—who have participated in procurement functions[259] in connection with contracts awarded by the DOD. These officials must report any contacts that they make regarding future employment opportunities to the defense contractor who was awarded the contract.[260] These DOD officials also must report any contacts that these defense contractors make with them regarding future employment opportunities.261 The reports—which must be made to the officials' supervisors and designated agency ethics officials—must include the dates of each contact and a brief discussion of the contact's substance.[262] A one-time contact that DOD officials immediately terminate requires neither disqualification[263] nor a report.[264]

If DOD officials fail to report other such contacts promptly or to disqualify themselves, if appropriate, they are subject to administrative penalties and, after leaving government service, a ten-year ban

---

[257] Defense Authorization Act for 1986, Pub. L. No. 99-145, § 923, 99 Stat. 583 (codified at 10 U.S.C. § 2397a). The Senate Armed Services Committee, during its three-day markup of the Senate bill [S. 674], included language requiring certain DOD employees [0-4 or GS-11 and above] to report contacts with a contractor regarding future employment opportunities and disqualify themselves from any official actions relating to that contractor. The Senate bill also strengthened the reporting requirement for DOD personnel who left government and went to work for defense contractors. ***See Revolving** Door Provision, supra* note 248. ***See** also* 1985 U.S.C.C.A.N. (99 Stat.) 611-12.

[258] 10 U.S.C. § 2397a(a)(2) (1992).

[259] Subsection 2397a(a)(6) defines the term "procurement function" to include any function, with respect to a contract, relating to "(A) the negotiation, award, administration, or approval of the contract; **(B)** the selection of a contractor; (C) the approval of changes in the contract; (D) quality assurance, operation and developmental testing, the approval of payment, or auditing under the contract; or (E) the management of the procurement program." *Id.* § 2397a(a)(6).

Based on the statute, it appears that almost any activity that is performed and which relates to a contract is considered to be a "procurement function" for the reporting requirements in § 2397a.

[260] *Id.* § 2397a(b)(1)(A).

[261] Id.

[262] *Id.* § 2397a(b)(1)(A),(c).

[263] For any period during which neither defense contractors, nor W D officials subject to this statute, have rejected future employment opportunities with each other after initial contacts by either party, the officials must disqualify themselves from all participation in the performance of procurement functions relating to the contracts of those defense contractors. 10 U.S.C. § 2397a(b)(1)(B) (1992).

[264] *Id.* § 2397a(b)(2).

on employment with the defense contractors involved in the contacts.[265]

(b) Reform.—The restrictions on seeking postgovernment employment imposed by § 2397a are similar in their application to the restrictions on seeking postgovernment employment that apply to all executive branch personnel under 18 U.S.C. § 208, Acts Affecting a Personal Financial Interest.[266] Accordingly, § 2397a is duplicative and subjects a selected class of executive branch officers and employees to unnecessary procedural requirements intended to ensure, as does $208, that these officials do not improperly use their government positions to further the interests of potential employers.[267]

Title 18, United States Code § 208 already requires that these DOD officials disqualify themselves under essentially the same conditions. In other words, DOD officials are prohibited from participating in their official capacity in any matter that involves an entity with which they are negotiating, discussing, or have an arrangement regarding future employment.[268] The practicalities of this prohibition mean that these officials must notify their supervisors of the situation and request disqualification if their duties require them to take actions affecting their potential employers, but they desire to negotiate for prospective employment. Supervisors must either ensure that the officials disqualify themselves and cease all participation in such matters, or make a determination that the officials' "interest" in their prospective employers are not so substantial as to be deemed likely to affect the integrity of the officials' duties.[269] Furthermore, Congress intended for the 1989 amendments to 18 U.S.C. § 208 to make that statute the government-wide standard for negotiating for postgovernment employment.[270]

Given the elaborate restrictions and procedures in 18 U.S.C. § 208, § 2397a of Title 10 merely adds the procedural requirement that the officials give written notice of the contacts and file written disqualification statements, if appropriate. Officials must comply with these § 2397a procedures even if they no longer perform official duties that could affect prospective employers. In essence, § 2397a

---

[265] *Id.* § 2397a(d)(1)(A). See *also* Defense Authorization Act for 1987, Pub. L. No. 99-661, § 932, 1986 U.S.C.C.A.N. (99 Stat.) 6456.

[266] *See supra* note 34.

[267] 136 CONG. REC. S8548.

[268] *See supra* note 34.

[269] 18 U.S.C. § 208(b)(1) (1992).

[270] The 1989 amendments to 18 U.S.C. § 208 made the restrictions and procedures on negotiating for employment while still in government service more definitive. See 136 CONG. REC. S8546. *See also* Ethics Reform Act of 1989, *supra* note 20.

requires affirmative action by DOD officials who already are disqualified, de facto, from the performance of procurement functions relating to the contracts of those particular defense contractors.[271] Accordingly, the bureaucratic procedural requirements in § 2397a constitute an example of overkill for no valid purpose and impose a labyrinth network of confusing and overlapping administrative requirements on an already overburdened DOD ethics program.

For the sake of uniformity—and because it is discriminatory to subject only DOD procurement personnel to an additional layer of overlapping procedural requirements and penalties that differ from those that apply to other executive branch officers and employees—§ 2397a should be repealed.

3. Prohibitions on Employment by Defense Contractors ***Under*** *Section 2397b*

(a) Generally.—None of the revolving door and conflict of interest statutes enacted prior to or after § 2397b prohibit former government officials from accepting employment with defense contractors. Instead, these statutes restrict former government officials from performing certain representation or selling activities for their employers. However, § 2397b was the first, and so far the only, statute to prohibit certain DOD officials from accepting compensation from—that is, accepting employment with—certain defense contractors.

Section 2397b arose through a somewhat circuitous route. First, the Defense Authorization Act for 1986prohibited presidential appointees from accepting, for a two-year period, postgovernment employment with any defense contractors with whom they acted as primary government representatives in the negotiation or settlement of a government contract.[272] Considerable confusion arose as to whether the term "presidential appointees" covered all officers in the military as well as civilian appointees, by virtue of the fact that military officers also are appointed by the President with the

---

[271] 136 CONG. REC. S8546.

[272] Defense Authorization Act for 1986, Pub. L. No. 99-145, § 921, 99 Stat. 583, 698. Both the House and Senate bills contained provisions limiting the activities of DOD employees regarding postgovernment employment. The House bill placed an absolute two-year prohibition on employment by defense contractors of any government employees who had significant responsibilities for procurement functions regarding those contractors or any of their subsidiaries or affiliates. However, the House yielded with an amendment that added **a** new provision to the Senate bill prohibiting presidential appointees who acted **as** primary government representatives in negotiating **or** settling government contracts from accepting employment with those contractors within two years after the termination of such activities. ***See*** 1985 U.S.C.C.A.N. 611-12. ***See*** *also* Defense Authorization Act for 1987, **Pub.** L. **No.** 99-661, 1986 U.S.C.C.A.N. (99 Stat.) 6455.

advice and consent of the Senate.[273] Because this issue remained unresolved, and because of congressional uncertainty regarding the impact of that two-year ban on the ability of the DOD to attract and retain qualified officials to serve in key acquisition assignments, Congress repealed this provision.[274]

In 1986, Congress created a new § 2397b in chapter 141, Title 10, United States Code.[275] This provision originated out of four revolving-door bills introduced in the ninety-ninth Congress.[276] All of the bills would have applied to procurement personnel government-wide, not just to DOD personnel. Unfortunately, Senator Levin narrowed his bill[277] only to apply to DOD personnel.[278] Senator Levin chaired the Senate Armed Services Committee, which agreed to his bill's language regarding the revolving door between DOD procurement officials and private industry.[279] This occurred despite then-Deputy Defense Secretary William H. ?aft's testimony in a hearing before the Senate Armed Services Defense Acquisition Policy Subcommittee in 1985. Secretary Taft testified that no need existed to tighten current statutory restrictions on postgovernment

---

[273] Defense Authorization Act for 1987, Pub. L. No. 99–661, 1986 U.S.C.C.A.N. (99 Stat.) 6455.

[274] Section 921 of the Defense Procurement Improvement Act of 1985—TitlelX of the Defense Authorization Act for 1986, Pub. L. No. 99–145, 99 Stat. 583 (codified at 10 U.S.C. § 2397a)—was repealed by the Act of Oct. 30, 1986, Pub. L. No. 99–591, 100 Stat. 3341.

[275] Continuing Appropriations Act for 1987, Pub. L. No. 99–591, § 931, 1986 U.S.C.C.A.N. (100 Stat.) 3341-156.

[276] *Levin to Offer Bill to Close "Revolving Door"; DOD Official Defends Status Quo*, BNA, Mar. 26, 1985, at A-3, *available in* LEXIS, Nexis Library, BNA File (hereinafter *Levin Bill]*. Senator David Pryor (D-Ark.) and Senator Charles Grassley (R-Iowa) sponsored S. 490, and Representative Barbara Boxer (D-Calif.) sponsored a companion measure, H.R. 1201, that would have prohibited a firm from hiring former federal employees [at or above **0-3** or GS-8 rank] who played significant roles in the award or administration of the firms' government contracts within five years after the termination of the contracts. Senator William Proxmire (D-Wis.) sponsored S. 385, that would have imposed a two-year waiting period before former federal contracting personnel at the GS-13 level or above could accept employment with firms over which they had personal and substantial involvement in contracting authority within the three-year period prior to leaving government service. Senator Proxmire's bill also would have required the former employees and contractors considering hiring those employees to file joint requests with the Office of Personnel Management for advisory opinions on whether the employment would constitute conflicts of interest. Senator Carl Levin (D-Mich.) then offered S. 674, that would have barred former government employees who, within the three-year period prior to leaving government service, had participated personally and substantially in government procurement functions relating to contracts, from accepting employment with those contractors for a period of two years after leaving government service. Senator Levin's bill would have applied to former officials at or above pay grade 0-3 or GS-9. *See also Revolving Door Provision, supra* note 248.

[277] *See supra* note 276 (discussion concerning S. 674).

[278] *See supra* note 276 (discussion concerning S. 674).

[279] *Revolving Door Provision, supra* note 248.

employment of contracting personnel, and that the conflict of interest problem was more apparent than real. He further noted as follows:

> We have not seen evidence . . . that DOD officers or employees relax contractor requirements in order to curry favor and gain future employment. We doubt that this is a common practice or a substantial problem. On the contrary, I believe a contractor is more likely to hire a departing DOD official who has aggressively represented the government's interests. . . . [T]he current law works well to address actual conflicts of interest.[280]

Secretary Taft also opined that postgovernment employment restrictions caused problems for DOD in its efforts to recruit persons from industry to fill certain positions, although he acknowledged that the "appearance" of a conflict of interest in the minds of some might undermine public confidence in the DOD's program.[281] He requested that Congress—if it insisted on tightening the law to address concerns about improper appearances—do so with a "narrowly crafted" limitation rather than one that would severely impose on employment opportunities for former government employees.[282]

Then-subcommittee Chairman Dan Quayle (R-Ind.) agreed with Secretary Taft that sweeping legislation on this issue would be "counterproductive," and noted that he was searching for a compromise that would ensure against abuse but still remain reasonable.[283] Subcommittee member Alan Dixon (D-Ill.) also agreed that it would be unwise to "make appearance a crime."[284]

Several months later the House Judiciary subcommittee held hearings on another similar bill that Representative Charles Bennett (D-Fla.) had introduced the previous year.[285] The bill prohibited DOD employees who had "significant responsibilities for a procurement

---

[280] Deputy Defense Secretary William H. Taft testified on March 19, 1985. ***See Levin Bill, supra*** note ***276.***

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] Representative Bennett referred H.R. 2554 to the House Armed Services Committee, which reported out the bill after making changes. The House referred the measure to the Judiciary, and Post Office and Civil Service Committees, on November 21, 1985. The committees had until March 15, 1986, to make any changes to the measure, after which date the bill became eligible for House floor action. ***See Conflict of Interest Measure Aimed at Defense Procurement Criticized at House Hearing,*** BNA, Feb. 4, 1986, ***available in*** LEXIS, Nexis Library, BNA File [hereinafter ***Procurement Measure Criticized***].

function" with respect to contractors—during the two-year period prior to leaving their agency—from working for those contractors for two years after leaving the DOD.[286] The bill drew heavy criticism from most of the witnesses who testified at the two-day hearing. Their testimony questioned the need for the bill based on a lack of first, any documentation showing such a need and, second, precision in the bill's language as to whom the two-year postgovernment employment ban would apply.[287] Nevertheless, after several more changes to its language, the bill eventually was enacted as 10 U.S.C. § 2397b.[288]

Today, § 2397b imposes an additional layer of postgovernment prohibitions on a select class of DOD officers and employees—personnel at or above military 0-4 rank or civilian GS-13 level. Its target is contracting officers, program managers, claims settlement officials, and contract administrators or auditors in a contractor's facility.[289] This section prohibits DOD officials from accepting compensation valued above $250 from companies with more than $10 million in defense contracts if the officials, during the two years prior to leaving the government, met at least one of two conditions. First, the officials must have spent a majority of working days[290] performing procurement functions at sites or plants owned by these contrac-

---

[286] *Id.*

[287] *Id.*

[288] *See supra* note 275. Interestingly, some of the statutory language that is the most difficult to understand and apply, and that still survives today, originated in the testimony of the DOD Deputy Inspector General, Derek Vander Schaaf. Mr. Vander Schaaf testified that, even though he supported H.R. 2554 *(see supra,* note 285), the bill's definition of "significant responsibilities" needed clarification. He recommended that the bill's coverage be limited to "individuals whose procurement-related duties are substantial or continuing with respect to a particular contractor and who exercise ***decisionmaking responsibilities,*** either directly or as an adviser to the decision maker." Mr. Vander Schaaf also recommended that DOD policy makers, whose decisions are directed toward contractors across the board rather than particular contractors, be exempt from the measure. ***See Procurement Measure Criticized, supra*** note 285 (emphasis added).

[289] *See Mavroules Amendment, supra* note 256.

[290] A portion of any working day which is spent performing a procurement function qualifies as one "work day.'' For example, if officials state that they spend only 20% of their time performing procurement functions, that 20% might still fall within the restrictions because the functions need only have involved any portion of a work day, not the whole work day. ***See*** Memorandum, Department of Defense Office of General Counsel, to Members of the Ethics Oversight Committee, subject: "Revolving Door" Update (10 U.S.C. § 2397b) (20 Apr. 1987).

Further, the term "majority of working days" refers to the ''major defense system" involved, not to each individual contract under that system. Thus, individuals who have worked a majority of their days on major defense systems will be restricted as to every one of those systems' prime contractors with whom they have had the requisite contacts. ***See*** Memorandum, Department of Defense Office of General Counsel, to Members of the Ethics Oversight Committee, subject: Ethics Update Letter #6, 10 U.S.C. § 2397b (8 Mar. 1989).

tors;[291] or, second, these officials must have participated personally and substantially, in a manner involving decisionmaking responsibilities[292] through contact with the contractors, regarding procurement functions relating to major defense systems.[293]

(b) Reform.—As enacted by Congress, the intent of § 2397b is to prevent the possibility of, as opposed to actual, conflicts of interest in postgovernment employment. In its application it slays only imaginary dragons that may never materialize. A staff analysis prepared for the House Armed Services Subcommittee on Investigations reported that the two-year ban on employment in § 2397b "is clearly intended to preclude even the appearance that an individual may have acted differently while in the government in the hopes or based on a promise of future employment with"[294] a contractor. The analysis recommends that § 2397b be repealed.[295]

In its execution, § 2397b overreaches by creating a "conclusive presumption"[296] that employment with a defense contractor within two years of leaving government service is a conflict of interest, even if one's work for the defense contractor has no connection whatsoever with one's former government duties or even the DOD itself. It is a remedy for a potential, rather than an actual, "problem" based solely on congressional speculation that the public ***might*** perceive that procurement officials ***might*** curry favor with defense contractors with whom they work to secure future employment.

Section 2397b's "remedy" against "appearance" problems is addressed sufficiently in Federal ***Acquisition*** Regulation *(FAR)*

---

[291] If the buildings involved are leased from a third party and occupied by both contractors and DOD employees, any DOD officials who work in those buildings and are covered by § 2397b—if the DOD employees work with those contractors' employees on common contracts or projects—are considered to be working at contractors' "sites" for purposes of the statute. ***See*** Memorandum, Department of Defense Office of General Counsel, to Members of the Ethics Oversight Committee, subject: "Revolving Door" Update Letter #3 (22 May 1987).

[292] *Id.* "Decisionmaking responsibilities" include personal and substantial participation in a matter through decision, approval, disapproval, recommendation, advice, investigation or otherwise. The Office of Government Ethics uses this terminology to describe an "official act."

[293] 10 U.S.C. § 2397b(a)(1)(A), (B) (1992).

[294] *See Mavroules* ***Amendment, supra*** note 256.

[295] *Id.* The analysis also recommended, in the alternative, that 10 U.S.C. § 2397b be applied government wide if the Congress would not support the total repeal of 10 U.S.C. § 2397b. The analysis noted that "[i]f the behavior it is intended to prevent is such that a restriction on employment in any capacity is desirable, that rationale should apply to all government procurement officials in similar situations."

[296] The term "conclusive presumption" came from the hearing testimony of Hugh Witt, representing the Aerospace Industries Association. Mr. Witt commented that the bill "creates a conclusive presumption that employment within two years [after leaving DOD] is a conflict." ***See Procurement Measure*** *Criticized,* ***supra*** note 285.

1.602-2, Contracting Officers' Responsibilities.[297] This FAR provision requires contracting officers to take actions to preserve the integrity of the procurement process. These responsibilities are, therefore, sufficient authority for procurement officials to disaffirm contracts tainted by actual or apparent conflicts of interest.[298] For example, the appearance of an unfair competitive advantage will justify a contracting officer's action to exclude a bidder from receiving the award of a contract.[299] Similarly, conduct that compromises the integrity of the competitive process is sufficient to sustain a contract's termination.300 Accordingly, the ***FAR*** provides more than adequate protection against "appearance" problems in the procurement process.

Two witnesses at the hearings for the legislation that eventually became § 2397b strongly criticized its overreaching nature. Mr. Hugh Witt, representing the Aerospace Industries Association, opposed the measure outright and commented that "[t]his two-year disqualification, without regard to how remote the job may be from the DOD's business, is too broad and unfairly stigmatizes DOD personnel."[301] Mr. Witt also opined that "[n]o specific legislation . . . will ever solve" the problem of a handful of people who will always take advantage of a situation to improve their personal reputation or fortune.[302] Mr. Witt further objected to the bill's confusing and complex language, noting that to define those DOD officials who would be covered by the measure's language about personnel who had "significant responsibilities for a procurement function" would be difficult.[303] Mr. David Martin, then-Director of the Office of Government Ethics, testified that the bill was "ill-advised" because no indication existed that postgovernment employment conflicts of interest were a problem.[304] Even the subcommittee chairman, Representative Dan Glickman (D-Kan.), repeatedly expressed concern about the

---

[297] FAR 1.602-2.

[298] Naddaf Int'l Trading Co., B-238768.2, Oct. 19, 1990, 90-2 CPD ¶ 316. ***See*** *also* United Tel. Co. of the Northwest, GSBCA Nos. 10031-P, 10067-P, 89-3 BCA ¶ 22,108.

[299] Compliance Corp., 22 Cl. Ct. 193(1990) (party disqualified from the competitive process for having attempted to obtain the incumbent's proprietary information by bribing one of the incumbent's employees). ***See*** *also* Holmes and Narver Servs., Inc., B-235906, Oct. 26, 1989, 89-2 CPD ¶ 379; and CACI, Inc.—Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983).

[300] Huynh Servs. Co., B-242297-2, June 12, 1991, 91-1 CPD ¶ 562 (termination for convenience was reasonable to protect integrity of competitive bidding process given evidence that employee of the second low bidder, who had reviewed and supervised the bidding for that bidder, was married to owner of company that received the contract as the low bidder).

[301] ***See*** Procurement Measure Criticized, *supra* note 285.

[302] *Id.*

[303] *Id.*

[304] Id.

lack of "hard evidence" to indicate that the DOD had a problem with postgovernment employment conflicts of interest.[305] Representative Glickman also was concerned about the vagueness of the term "significant responsibilities."[306]

Another compelling reason to repeal § 2397b exists. The concepts and definitions it employs are so complex that Congress believed it would be wrong to leave government employees and contractors to their own resources to determine whether a particular postgovernment employment relationship would be precluded statutorily.[307] Accordingly, Congress provided a mechanism within the statute that permits DOD officials to request opinions from their DAEOs as to whether the requesting officials may accept postgovernment employment—compensation—from particular defense contractors.[308] The DAEOs are required by law to provide the requesting officials with written opinions within thirty days of receiving the request.[309] If the officials are told that they may accept such employment, a conclusive presumption—that is, a "safe harbor"—arises that the officials will not violate the statute by accepting such employment.[310]

Although the DOD experience has been that § 2397b actually applies to very few people,[311] the written "safe harbor" opinions the section generates impose a significant administrative burden on DOD ethics officials. Defense contractors are aware of the availability of these "safe harbor" opinions and as a matter of practice refuse to hire former DOD officials who have not obtained written opinions stating that their employment with the defense contractors will not violate the law.[312] Some defense contractors require officials—before they can become employees of the contractors—to have written opinions even if the officials never were involved in procurement or procurement-related activities. Other defense contractors will not negotiate with DOD officials unless they have written opinions declaring it permissible for them to seek employment with, and be employed by, defense contractors.[313]

These opinions are not pro forma. Each must be written by a

---

[305] *Id.*

[306] *Id.*

[307] 136 CONG. REC. S8549.

[308] 10 U.S.C. § 2397b(e)(1) (1992).

[309] *Id.* § 2397b(e)(3).

[310] *Id.* § 2397b(e)(4).

[311] 136 CONG. REC. S8548.

[312] *Id.* at S8547.

[313] This knowledge is based on the author's five years experience as an ethics counselor.

lawyer and tailored to address the propriety of a specific DOD official's employment with a specific defense contractor based on the particular procurement duties that the DOD official performed for the government.[314] From April 6, 1987, when § 2397b became effective, through December 1, 1989, when the 1989 Ethics Reform Act suspended the section,[315] the DOD prepared approximately **4,400** "safe harbor'' opinions under § 2397b.[316] In only about four percent of the cases were the DOD officials' prospective postgovernment employment prohibited by the statute.[317] Unless Congress repeals § 2397b, DOD ethics officials—especially those in procurement commands or on major procurement installations—should expect to continue being inundated with requests for written opinions regarding the propriety of postgovernment employment and employment activities.

Department of Defense ethics counselors are frustrated by the substantial effort, time, and resources expended on these opinions, especially because the vast majority of DOD officials requesting the opinions do not need them because they do not fall within the statute's coverage.[318] Most unfortunate is that the statute is so complex that DOD ethics officials need written opinions from ethics counselors to protect them from unwittingly violating the law. Ethics laws should be straightforward enough to be readily understandable to most employees.

Some members of Congress concede that the overwhelming administrative burden on the DOD created by requests for these "safe harbor" opinions probably was "not envisioned" and "would appear to be disproportionate to the purpose it serves.''[319] These members also recognize that the requirement to provide these written opinions to so many DOD officials has diverted thousands of hours from ethics training and counseling.[320]

The requirement for written "safe harbor" opinions—when layered on top of all the other DOD-unique and government-wide postgovernment employment restrictions that DOD personnel must learn and abide by—contributes significantly to the DOD's difficulty

---

[314] 136 CONG. REC. S8547.

[315] *See supra* **note 20. The Ethics Reform Act of 1989 suspended § 2397b—***among* **other statutes—and § 2397 had no force or effect during the period** *beginning* **December 1, 1989 and ending December 1, 1990.**

[316] **136 CONG. REC. S8548–9 (this figure does not include opinions issued under the "safe harbor" provisions of the Procurement Integrity Act, 41 U.S.C. § 423(k)).**

[317] **136 CONG. REC. S8549.**

[318] *Id.* **at S8548.**

[319] *Id.*

[320] *Id.* **at S8549.**

in providing meaningful and understandable ethics training. Even Congress recognized that the best that the DOD's ethics training can hope to accomplish is to "give employees the impression that employment after government service has so many pitfalls that they must seek individualized counseling before leaving government."[321]

By attempting to prevent conflicts of interest, § 2397b mirrors in purpose—though certainly not in scope and coverage—the restrictions imposed by 18 U.S.C. § 207. This duplication in purpose is unnecessary, however, and Congress should repeal § 2397b. As Congress intended, the 1989 Ethics Reform Act[322] amended 18 U.S.C. § 207 to make it the single, comprehensive, government-wide post-government employment statute. The restrictions that § 207 imposes on postgovernment conduct are sufficient to protect against conflicts of interest while satisfying the public's need for assurances of integrity in the government's procurement programs.

D. Two-Year Selling Restriction Imposed By 18 U.S.C. § 281

1. *Generally.*—The selling and claim prosecution restrictions in 18 U.S.C. § 281 have existed for years. In 1948, three Title 18 sections imposed selling and claim prosecution restrictions on active and retired officers.[323] The first section, 18 U.S.C. § 281, imposed an indefinite selling restriction in a reversed manner. Section 281 exempted retired military officers from the proscription against officers receiving compensation for services rendered before a United States officer or department if the United States was a party to or interested in the matter. Nevertheless, the section stated further that "[n]othing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the government through the department[324] in whose service he holds a retired status."[325] The second section, 18 U.S.C. § 283, prohibited officers from acting as agents or attorneys for prosecuting, or aiding or assisting in the prosecution of, any claims against the United States.[326] The third section, 18 U.S.C. § 284(a), prohibited former officers, for two years after leaving government service, from prosecuting or acting as counsel, attorneys, or agents for prosecuting any claims against the

---

[321] *Id.*

[322] *See supra* note 20.

[323] 18 U.S.C. § 281, Compensation to members of Congress, officers, and others in matters affecting the government; 18 U.S.C. § 283, Officers or employees interested in claims against the government; and 18 U.S.C. § 284(a), Disqualification of former officers and employees in matters connected with former duties.

[324] The term "department" as used here refers to the military departments—such as, Department of the Army, Department of the Navy.

[325] Act of June 25, 1948, Pub. L. No. 772, § 281, 62 Stat. 697.

[326] *Id.*

United States involving any subject matter in which the officers were connected directly while employed by the government.[327]

In 1962, Congress repealed §§ 281 and 283, except as they applied to retired military officers.[328] Congress also repealed § 284(a), but continued its restrictions regarding the postgovernment employment activities of former officers and employees in a single new section, 18 U.S.C. § 207.[329]

Several years later Congress repealed the limited applicability of §§ 281 and 283 to retired military officers, and substituted a new § 281.[330] This new section contained the same selling restriction as before, yet it clarified the language by specifically prohibiting retired military officers from receiving compensation for representing any person in the sale of anything—that is, goods or services—to the United States through the military departments from which the officers retired. Furthermore, this new section changed the selling prohibition from a permanent ban to a two-year ban, beginning on the dates the military officers retired.[331] Section 281 also prohibited—with some changes—the prosecution of claims. Specifically, § 281 prohibited retired military officers, for two years after release from active duty, from acting as agents or attorneys for prosecuting or assisting in the prosecution of any claims against the United States involving (1) the military departments in which the officers were retired, or (2) any subject matter with which the officers were connected directly while on active duty.

At the time Congress enacted this new section, the Senate and House Judiciary Committees were considering a request from the DOD to repeal the previous versions of 18 U.S.C. §§ 281 and 283 in their entirety.[332] The DOD based its request on a desire to treat retired regular officers on the same basis as former civilian employees, retired reserve officers, enlisted military members, and former military personnel (who had not retired) for purposes of applying conflict of interest laws.[333] The congressional conferees for the new section 281 conceded that its enactment did not obviate the need for the Judiciary Committees to continue with a comprehensive review of the DOD's request.[334]

---

327 *Id.*

328 *See supra* note 50.

329 *See supra* note 50, at 76 Stat. 1126. *See also* text accompanying notes 51–62.

330 Defense Authorization Act for 1988 and 1989, Pub. L. No. 100–180, § 822, 1987 U.S.C.C.A.N. (101 Stat.) 1132.

331 *Id.* Specifically, the selling restriction was included in 18 U.S.C. § 281(a)(1).

332 *Id.* at 1987 U.S.C.C.A.N. 1777.

333 *Id.*

334 *Id.*

Today's version of 18 U.S.C. § 281 differs by one word from its revision by Congress in 1987.[335] Two points regarding § 281, however, need highlighting. First, the Department of Justice has opined that the restrictions in § 281 do not apply to situations where the retired military officers represent only themselves and no other individuals in selling activities.[336]

This distinction often is difficult to make, and each case depends on its facts as to whether the retired military officers are truly only representing themselves and not others as well. For example, retired military officers would be wise to avoid selling on behalf of entities in which the retired officers are co-owners or shareholders.[337] Second, § 281 only restricts sales to the military departments from which the military officers retired. For example, § 281 does not prohibit retired Army officers from representing companies in the sale of anything to the Navy or Air Force; they are only prohibited from selling to the Army. Note, however, that these retired officers, who are not prohibited by § 281 from selling to the Navy, may run afoul of 37 U.S.C. § 801(b) if they sell goods to the Navy. This article will discuss this prohibition in more detail in succeeding paragraphs.

2. Reform.—Congress should repeal § 281 because the government-wide, postgovernment employment restrictions in 18 U.S.C. § 207 have superseded it in purpose. Like § 207, § 281 targets the improper use of influence by former government officials and, thus, prohibits certain representational selling activities. Section 207 establishes a more appropriate scheme of restriction, however, because it relates the bans on postgovernment representational activities directly to both the level and nature of former government officials' duties while in the government, and to the particular matters on which they worked as government officials.[338]

The prohibitions on representational activities in subsections 207(a)(1) and (2) are triggered only if the former government officials participated personally and substantially in particular matters involving specific parties, or if those matters fell under the individuals' official responsibility during their last year of government service. The former officials' representational activities are limited only with respect to that same particular matter. The sort of nexus

---

[335] *Id.* at 1132. The word "exempted" superseded the word "excepted" in 18 U.S.C. § 281(c)(2).

[336] Letter from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to Colonel Arnold I. Melnick, Chief, Litigation Division, Dep't of Army (Nov. 30, 1981) [hereinafter Olson Letter] (on file with the *SOCO*, OTJAG). *See also* United States v. Gillilan, 288 F.2d 796, 797 (2d Cir. 1961).

[337] Olson Letter, *supra* note 336.

[338] 136 CONG. REC. S8549.

that makes this type of representational restriction appropriate and meaningful is lacking in § 281.339

At a time when civilians conduct most DOD procurement work, no rational basis exists for singling out a subclass of retired military officers for more restrictive postgovernment employment rules regarding sales to the government. Prohibiting retired Army officers with a career in operational line assignments—and no involvement with procurement—from representing a company in the sale of boots to the Army serves no demonstrative purpose. What fire-breathing dragon does this selling restriction slay? From what demonstrated harm is the government being protected? If, prior to retirement, the Army officers were involved personally and substantially in the Army's procurement of boots, or if that matter fell under the officers' official responsibilities during their last year of service, the representation restrictions in § 207 would protect the Army against any improper influence. If the same retired officers had nothing whatsoever to do with boots while in the Army other than to wear them, no improper influence arises from which to shield the Army should those retired officers represent parties in selling boots to the Army.

The only retired military officers who might have any influence based solely on their status as retired officers—rather than on their former involvement in particular matters—would be general or flag officers. However, subsection 207(c) preempts the possibility that these officers might wield such leverage through improper influence.[340] This subsection prohibits retired general and flag officers, among others, from attempting to influence the official actions of their former departments for one year after they leave government service.

To burden only retired military officers with an absolute criminal selling prohibition that has no nexus to the officers' prior military duties is unfair. Section 281 once was suspended for eighteen months while Congress debated bills that attempted to streamline the revolving door ethics laws.[341] Although those bills failed for various reasons,[342] Congress should repeal § 281 permanently.

---

[339] *Id.*

[340] *See supra* note 18.

[341] The Ethics Reform Act of 1989, *supra* note 20, suspended 18 U.S.C. § 281, as well as 41 U.S.C. § 423 and 10 U.S.C. §§ 2397a and 2397b, for one year beginning on December 1, 1989, and ending on December 1, 1990. *See also* 1989 U.S.C.C.A.N.1759. The one-year suspension—for 18 U.S.C. $281, 10 U.S.C. §§ 2397a and 2397b, and 41 U.S.C. § 423(f), as the remainder of the Procurement Integrity Act in § 423 went back into effect on December 1, 1990—was extended to May 31, 1991, pursuant to the Defense Authorization Act for 1991, Pub. L. No. 101-510, Div. A, Title VIII, § 815(a)(3), 1990 U.S.C.C.A.N.(104 Stat.) 1597.

[342] *See Pentagon Forces*, *supra* note 177.

E. Three-Year Selling Restriction Imposed by 37 U.S.C. § 801(b)[343]

1. Generally.—In 1951, Congress enacted what eventually became 37 U.S.C. § 323, which prohibited payments from any appropriations to any officers on the retired lists of the regular uniformed services[344] if such officers, within two years of retirement, sold, contracted, or negotiated for the sale of supplies or war materials to any agency of the Department of Defense, Coast Guard, Coast and Geodetic Survey (today's National Oceanic and Atmospheric Administration) or Public Health Service.[345] This law was an outgrowth of a similar law found at 10 U.S.C. § 6112. Section 6112 provided for the withholding of retired pay during the period in which retired officers of the Regular Navy or Regular Marine Corps engaged in, for themselves or others, selling, or contracting or negotiating to sell, naval supplies or war materials to the Department of the Navy.[346] In 1953, Congress enacted 5 U.S.C. § 59c, which mirrored, with no language change, 37 U.S.C. § 323.[347] Interestingly, Congress left the same restriction in 37 U.S.C. § 323, and the 1958 edition of the United States Code contains the same restriction in Title 5 (§ 59c) and Title 37 (§ 323).

In 1962, Congress repealed 5 U.S.C. § 59c but enacted the same selling restriction, with slight language changes, in 37 U.S.C. § 801(c).[348] This action was part of a congressional intent to restate—in comprehensive form without substantive change—the laws applicable to the pay and allowances of members of the uniformed services, and to eliminate the overlaps and inconsistencies in previously enacted laws in this area.[349] That same year, Congress also extended

---

[343] The Defense Authorization Act for 1991, Pub. L. No. 101-510, Div A, Title XIV, § 1484(c)(2), 1990 U.S.S.C.A.N. (104 Stat.) 1716, provided for § 801 to be amended by striking out the "(b)" before the words "payment may not be made." This made sense because the Ethics Reform Act of 1989 repealed § 801(a). See *supra* note 20. The 1992 annual pocket part (West Publishing Company) to Title 37, United States Code, however, retains the "(b)" before the words "payment may not be made."

[344] The uniformed services are not the same as the armed services. In peacetime, the *armed* services consist of the military departments that constitute the DOD—the Departments of the Army, Navy (including the Marine Corps), and the Air Force. The *uniformed* services include not only the military departments in the DOD, but also the Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration (in 1953 this was called the Coast and Geodetic Survey).

[345] Supplemental Appropriation Act for 1952, Pub. L. No. 253, ch. 664, ch. XIII, § 1309, 1951 U.S.C.C.A.N. 766, 65 Stat. 757.

[346] *See* To the Secretary of the Navy, B-144947, 40 Comp. Gen. 511 (1961).

[347] Supplemental Appropriations Act for 1954, Pub. L. No. 207, ch. 340, ch. XIII, title I, § 1309, 1953 U.S.C.C.A.N. 483, 67 Stat. 437.

[348] Act of Sept. 7, 1962, Pub. L. No. 87-649, § 14b, 1962 U.S.C.C.A.N. 527, 76 Stat. 451,485.

[349] S. REP. No. 1874, 87th Cong., 2d Sess. 2 (1962). See also 1962 U.S.C.C.A.N. 2390.

the time period on the selling restriction in § 801(b) from two to three years.[350]

Various amendments in recent years repealed other subsections of § 801, to where subsection (b) now contains the three-year selling restriction.[351] Although the language in today's § 801(b) has changed slightly over the years, the selling restrictions originally imposed have remained the same, except for the change from two to three years.[352] Section 801(b) provides for the loss of retired pay by retired regular officers of the uniformed services if, within three years after the officers' names are placed on the retired list, they engage in activities, for themselves or others, involving the sale of supplies or war materials to the Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service, or National Oceanic and Atmospheric Administration.353

No exceptions or qualifications are made in the law. "Selling'' is construed broadly by the Comptroller General to include any phase of the procurement process. Any activity that has as its goal the ultimate consummation of a sale is prohibited selling under the statute.[354] Knowledge, intent, or even lack of good faith are not necessary to trigger withholding of retired pay.[355] Purely social contacts, and contacts that involve no sales activity whatsoever, are both outside the purview of the statute, as are contacts with non-contracting technical specialists if the retired officer occupies a non-sales, executive, or administrative position.[356] The phrase "supplies or war materials" includes any article of tangible property purchased by the military departments.[357] Selling activities to provide services—such as consulting services—do not fall within the purview of the § 801(b) prohibition against selling supplies or war materials.[358]

Should retired regular officers violate § 801(b), they will forfeit their retired pay during the period of the prohibited selling activity,

---

[350] Act of Oct. 9, 1962, Pub. L. No. 87-777, § 2, 1962 U.S.C.C.A.N. 907, 76 Stat. 777.

[351] Ethics Reform Act of 1989, supra note 20, Title V, § 505(a); Defense Authorization Act for 1991, supra note 343.

[352] *See supra* note 33 (current language of 37 U.S.C. § 801(b)).

[353] *Id.*

[354] Lieutenant Commander Fred M. Cloonan, B-175116, 58 Comp. Gen. 3 (1972); Lieutenant Commander Ronald Anthony, B-137231, 38 Comp. Gen. 470 (1959).

[355] Lieutenant Colonel Theodore W. Hammet, USA, Retired, B-198751, Jan. 8, 1982, 1982 U.S. Comp. Gen. LEXIS 1599.

[356] Theodore W. Hammet, B-198751, Feb. 19, 1981, 1981 U.S. Comp. Gen. LEXIS 232.

[357] To the Secretary of Defense, B-148130, 41 Comp. Gen. 677 (1962); Lieutenant Commander Ronald Anthony, B-137231, 38 Comp. Gen. 470 (1959).

[358] Dikewood Services Co., B-186001, 56 Comp. Gen. 188 (1976).

and during any ensuing contract, but not longer than three years from the date that the officers' names were placed on the retired list.[359]

2. *Reform.*—At a minimum, Congress should repeal the § 801(b) selling restrictions imposed on retired regular DOD officers, for the same reasons proposed for repealing 18 U.S.C. § 281. Section 801(b) is obsolete, particularly as applied to the military, because the government-wide, postgovernment employment restrictions in 18 U.S.C. § 207 have superseded it in purpose. Whereas 18 U.S.C. § 207 targets the improper use of influence by former government officials and, thus, prohibits certain postgovernment employment representational activities, § 801(b) is directed not only at the improper use of influence and favoritism but also at conduct that invites such improprieties.[360] Section 801(b)'s purpose—the elimination of any danger of favoritism or use of personal influence in the procurement process[361]—resulted from congressional concerns that contacts by retired regular officers would result in the award of contracts, even if such officers did not participate in the contract negotiations.[362]

Unlike § 801(b), 18 U.S.C. § 207(a) prohibits only those postgovernment employment representational activities that directly relate to particular matters in which the former government officials participated, or for which they had responsibilities, as government officials.[363] The former officials' postgovernment employment representation activities are limited only with respect to those same particular matters. Section 801(b) has no such nexus requirement.

Section 801(b) goes one step further than 18 U.S.C. § 281, however, in that it targets only retired ***regular*** officers, rather than all retired officers. A rational basis no longer exists for this distinction in the DOD. In today's military environment, where career paths and promotion and assignment opportunities are similar for active duty reserve and regular officers, Congress cannot provide a justification for concluding that retired regular military officers possess more influence, or are more prone to seek and use favoritism, than retired reserve officers. Consequently, any need to impose an extra set of restrictions on the postgovernment selling activities of retired regular military officers no longer exists.

Alternatively, § 801(b) falls one step short of 18 U.S.C. § 281. Whereas § 281 prohibits the sale of anything—such as, goods and

---

[359] *See supra* note 354.

[360] *See supra* note 346.

[361] *See supra* note 356.

[362] *See supra* note 346.

[363] *See supra* note 119. See *also* 136 CONG. REC. S8549.

services—§ 801(b) prohibits only the sale of goods but not the sale of services—such as, consulting services. Congress cannot present any rational basis for this distinction. If the purpose of § 801(b) is to protect the government's procurement program from improper influence and favoritism, why is it improper for retired regular officers to use their influence to sell boots but not to sell consulting services? Section 281 avoids this anomaly by prohibiting the sale of anything.

To parallel the example used in a preceding paragraph, where is the actual or potential conflict of interest if retired regular Army officers—with careers in operational line assignments and no involvement with procurement—desire to sell, for themselves or others, boots to the Air Force? Is it fair, much less reasonable, to "punish" by loss of retired pay certain selling activities by retired regular officers but not the same selling activities by retired reserve officers? If the retired Regular Army officers were involved person; ally and substantially in procuring boots for the Air Force while on active duty, or if the matter of procuring boots for the Air Force came under the officers' official responsibilities during their last year of service, the representation restrictions in § 207 will sufficiently protect the Air Force against improper influence if the officers retire one day and the next day attempt to sell boots to the Air Force.

One might argue that Congress should not repeal § 801(b) because it prohibits selling for oneself as well as others, whereas 18 U.S.C. § 207 prohibits only the representation of others, not oneself. However, if Congress believed it proper for retired officers to sell to their former military departments for themselves—18 U.S.C. § 281, which prohibits only sales on behalf of others, and not oneself—what rational basis exists for prohibiting retired officers from selling to other military departments for themselves? Again, these inconsistencies in the postgovernment employment selling statutes illustrate the need for their repeal.

If Congress believes that retired regular Army officers selling boots to the Air Force for themselves—regardless of the officers' retired ranks or that the officers are selling to departments other than the ones from which they retired—constitutes an actual, or potential, conflict of interest, then Congress should expand the application of 18 U.S.C. § 207(c) to include all ranks of retired officers. In testimony before a Senate subcommittee, the former Chief Domestic Policy Advisor to President Jimmy Carter exchanged the following comments with Senator Stevens:

> Senator Stevens. I just finished having a conversation this last week with a former member of the Joint Chiefs of

> Staff, and I was told that the members of the Joint Chiefs of Staff really aren't involved in making decisions on procurement. I don't think the public believes that. . . . I think we ought to have a fairness curtain, one year, I don't care whether you're a typist or you're the President, you should not have anything to do with the federal government if you served in the federal government.
>
> Mr. Eizenstat. You mean even below the senior level? . . . [I]f it's outside your own compartment, I really question whether there is going to be undue influence.[364]

An additional argument for the proposition that the distinction between retired reserve and retired regular officers for selling purposes is obsolete is derived from the Defense Officer Personnel Management Act of 1980 (DOPMA).[365] Until the DOPMA's enactment, an anomaly had developed in which large numbers of reserve officers could serve twenty years on active duty and qualify for active-duty retirement. The law which permitted this,[366] however, provided for different treatment of regular officers and reserve officers, which often resulted in perceived inequities by reserve officers.[367] Congress passed the DOPMA to eliminate these inequities by permitting an all-regular career military force. Now, officers who become eligible for integration into the regular component of their military department must accept such integration. Those who decline an appointment into their department's regular component on selection for promotion to 0-4 rank are released from active duty.[368] As a result of the DOPMA, the overwhelming majority of active duty officers above 0-4 rank are regular officers.

The repeal of 37 U.S.C. § 801(b) and 18 U.S.C. § 281 would eliminate the unfairness of burdening retired military officers with

---

[364] *See Lobbying* Hearings, *supra* note 134, at 14 (testimony of Stuart E. Eizenstat, partner in Powell, Goldstein, Frazer & Murphy and former Chief Domestic Policy Adviser to President Jimmy Carter).

[365] Defense Officer Personnel Management Act, Pub. L. No. 96-513, 1980 U.S.C.C.A.N. 6333, 94 Stat. 2835.

[366] The Officer Personnel Act of 1947, which is discussed in 1980 U.S.C.C.A.N. 6339.

[367] *Id.* at 6343. One of the inequitable situations involved the uncertain career expectations of reserve officers on active duty because they had no expectation of minimum time in grade prior to retirement or separation, and could be released at any time subject to the needs of the service. On the other hand, retired reserve officers at that time were not subject to the dual compensation laws, which restrict the amount of retired pay that career officers may receive if they work for the federal government in a civilian capacity. That is no longer the case. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 308, 1978 U.S.C.C.A.N. (92 Stat.) 1149.

[368] *See* discussion in 1980 U.S.C.C.A.N. 6355-56. See *also* DEP'T OF ARMY, REG. 601-100, APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY, paras. 2-39, 2-39.1 (IC2 10 Nov. 1982).

two additional layers of overlapping postgovernment employment selling restrictions—totally unrelated to the officers' prior government duties—that do not apply to other executive branch officers or employees.

V. Conclusion

One man's justice is another's injustice.[369]

In recent years, defense contractors and DOD officials have criticized the multiplicity of DOD ethics laws as a labyrinth of confusing and overlapping requirements. Former DOD officials are subject to upwards of five different postgovernment employment conflict of interest laws, each of which applies to different subclasses of persons, restricts different activities, and imposes different administrative procedures.

No reason exists to have different standards for executive branch officers and employees as a whole, DOD procurement officials (who differ depending on the particular statute at issue), retired military officers, and retired regular military officers. The net result of the accretion of these five statutes subjects DOD officials to a complex, multitiered system of incomprehensible and seemingly inconsistent statutory restrictions that are counterproductive to an effective and meaningful ethics training and counseling program. Congress apparently passed many of these laws without having read or understood their substance and relationship to one another, and it is not clear why, due to the many overlapping restrictions and coverage, Congress did not instead amend 18 U.S.C. § 207. Nevertheless, at the time of their enactment, most of these statutes served as supplements to existing government-wide remedies by creating civil remedies for conduct similar to that prohibited by the criminal conflict of interest statutes.[370] With the enactment of the 1989 Ethics Reform Act, however, Congress clarified the conflict of interest provisions in 18 U.S.C. § 207 and 18 U.S.C. § 208, and created a new class of misdemeanor violations and added civil penalties and injunctive relief for violations of most of the conflict of interest statutes in Chapter 11 of Title 18, United States Code.[371] This action effectively voided the necessity for the three DOD-unique statutes, as well as the Procurement Integrity Act.

---

[369] R.W. EMERSON, CIRCLES (1841).

[370] 136 CONG. REC. S8544.

[371] 18 U.S.C. § 216 (1992).

Repeal of these statutes will make the postgovernment employment conflict of interest restrictions simpler, easier to understand, and more subject to compliance, without undermining the integrity of the DOD procurement process. Repeal of these statutes also would reduce the overdeterrence practiced by many former DOD officials who, despite their best efforts, do not fully understand the restrictions imposed on them by these laws and, therefore, refrain from permissible activities because of their fear of running afoul of the law.

In summary, DOD officials presently can attempt to abuse the trust of their public office by two means. First, before leaving government service, they might seek to curry favor with potential employers by acting in procurements with less than the impartiality required of government servants. The disqualification requirements imposed by 18 U.S.C. § 208 are an effective check on this type of conduct. Second, after leaving government service, former DOD officials may attempt to take unfair advantage of their former positions to benefit new employers either by using their influence with former associates, or by revealing or using nonpublic information acquired as part of their official duties. Title 18, United States Code § 207 more than adequately addresses the potential for improper use of influence by banning contacts with former associates on matters in which these former DOD officials were involved.

APPENDIX A

SUMMARY OF POST-EMPLOYMENT RESTRICTIONS

(Effective 1 January 1992)

---

1. Applicable to all officers and civilian employees.

IF you were a Government officer or employee (including a special Government employee), THEN you may not—

ever—

make, on behalf of anyone else, with the intent to influence, any communication to or appearance before—

any Government officer or employee regarding—

any particular matter involving specific parties in which **you** ever participated personally and substantially for the Government (18 U.S.C. 207(a)(1)).

within 2 years after termination of your Government service—

make, on behalf of anyone else, with the intent to influence, any communication to or appearance before—

any Government officer or employee regarding—

any particular matter involving specific parties that you know was pending under your official responsibility in the last year of Government employment (18 **U.S.C.** 207(a)(2)).

---

2. Applicable only to officers and civilian employees who participated in treaty or trade negotiations.

IF you participated ,personallyand substantially in any treaty or trade negotiations and had access to nonreleasable information, THEN you may not—

within **1** year after termination of your Government service—

represent, aid, or advise—

anyone else concerning—

an ongoing trade or treaty negotiation in which during your last year of Government service you participated personally and substantially (18 **U.S.C.**207(b)).

---

3. Applicable only to "senior employees."

IF you held an Executive Level position, a military grade **0-7** or above, or an SES position at ES-5 or above, THEN you may not—

within **1** year after termination of service in a "senior employee" position—

make, on behalf of anyone else, with the intent to influence, any communication to or appearance before—

any officer or employee of a department or agency in which you served during your last year **as** a "senior employee" regarding—

any matter on which you seek official action (18 **U.S.C.**207(c)).

within **1** year after termination of service in a "senior employee" position—

aid or advise a foreign entity, or represent a foreign entity before the Government, with the intent to influence—

any Government entity, officer, or employee regarding—

any official decision (18 **U.S.C.**207(f)).

4. Applicable only to officers and civilian employees who participated in the conduct of a procurement.

IF, during the period from 16 July 1989 through 30 November 1989, you participated personally and substantially in the conduct of a particular Army procurement, or personally reviewed and approved the award, modification, or extension of any contract for that procurement, THEN you may not, after 31 May 1991 but—

within 2 years after the date of your last participation in that procurement—

participate on behalf of any competing contractor (i.e., any entity likely to be a competitor for or recipient of a Government contract or subcontract)—

in any manner whatsoever in—

any negotiations leading to the award, modification, or extension of any contract for that procurement **(41** U.S.C. 423(e)(1)).

within 2 years after the date of your last participation in that procurement—

participate on behalf of any competing contractor—

personally and substantially in—

the performance of that contract **(41 U.S.C.** 423(e)(2)).

5. Applicable to certain other procurement officials.

a. Officers and Civilian Employees in Grades Above 0-3 or GS-12:

IF during the **2** years prior to separation you performed a procurement function on a majority of your working days, either:

(1) At a site owned or operated by a particular DOD contractor, or

(2) Relating to a major defense system supplied by a particular DOD contractor with regard to which you participated personally and substantially in decisionmaking responsibilities through personal contact with that contractor, THEN you may not—

for **2** years after separation from DOD—

accept compensation from that particular contractor—

for any service whatsoever—

regardless of whether it involves any DOD matter (10 U.S.C. 2397b).

b. Officers and Civilian Employees in Grades Above 0-6 and GS-15:

IF, at any time during the 2 years prior to separation, you ever acted as one of the primary representatives of the United States in the negotiation of any DOD contract over $10 million, or in the settlement of a contract claim for over $10 million, THEN you may not—

for 2 years after separation from DOD—

accept compensation from that particular contractor—

for any service whatsoever—

regardless of whether it involves any DOD matter (10 U.S.C. 2397b).

---

6. Applicable only to retired Army officers.

IF you are a Retired Army Officer, THEN you may not—

within 2 years after retirement—

prosecute or assist in prosecuting any claim against the U.S. Government before—

any Government entity, officer, or employee regarding—

any matter with which you were directly connected while on active duty (18 U.S.C. 281(b)(2)).

within 2 years after retirement—

prosecute or assist in prosecuting any claim against the U.S. Government before—

any Government entity, officer, or employee regarding—

any matter involving the Army (18 U.S.C. 281(b)(1)).

within 2 years after retirement—

represent another, for compensation, in connection with selling to—

the Army or an Army nonappropriated fund activity—

anything, either goods or services (18 U.S.C. 281(a)(1)).

within 3 years after retirement as a Regular Army officer—

engage in selling, or contracting or negotiating in connection with a sale, to—

any DOD agency, including the military departments and all DOD nonappropriated fund activities—

any tangible property (but not personal or professional services) (37 U.S.C. 801(b)).

THE DUTY TO ELIMINATE COMPETITIVE ADVANTAGE ARISING FROM CONTRACTOR POSSESSION OF GOVERNMENT-FURNISHED PROPERTY

MAJOR STEVEN N. TOMANELLI*

I. Introduction

At the end of fiscal year 1992, Department of Defense (DOD) contractors possessed government-furnished property (GFP) costing over $83 billion.[1] When some contractors have access to GFP and others do not, a competitive advantage often accrues to the former to the detriment of the latter. Contract attorneys reviewing pre-solicitation contract files should be alert to this possibility. This article initially will discuss the impact that furnishing GFP can have on the competitive procurement process. Next, it will analyze the contracting officer's obligation to eliminate this competitive advantage and discuss several exceptions to that obligation recognized by the Government Accounting Office (GAO). Finally, it will distinguish between issues arising prior to award and those arising from postperformance contractor retention of GFP.

II. Overview

Many consequences attendant to the government's decision to furnish property to its contractors exist. Contractors with access to GFP will not have to incur the direct costs of acquiring similar property and, with regard to capital assets, will not have to capitalize and

---

* Judge Advocate General's Department, United States Air Force. Currently assigned as an Instructor, Contract Law Division, The Judge Advocate General's School, United States Army. B.A., *cum laude*, 1979, Hofstra University; J.D., 1982, Hofstra University; LL.M., Government Procurement Law, 1992, George Washington University. Formerly assigned as an Intern, Armed Services Board of Contract Appeals, 1992; Chief, Military Justice, Deputy Staff Judge Advocate, Homestead Air Force Base, Florida, 1988-91; Area Defense Counsel, 'Ibrrejon Air Base, Spain, 1986-88; Chief, Civil Law, Nonappropriated Funds Contracts Attorney, 'Ibrrejon Air Base, Spain, 1985-86; Assistant Staff Judge Advocate, Special Assistant United States Attorney, 1983-85. This article is an excerpt from a written thesis that the author submitted to satisfy, in part, the Master of Laws degree requirements at George Washington University.

[1] This information is maintained by the Office of the Under Secretary of Defense (Acquisition) (USD(A)) and was graciously provided to the author by Mr. James H. Kordes, Deputy for Property Policy and Programs, Office of the Assistant Secretary of Defense (Production and Logistics).

allocate their acquisition costs to particular government contracts.[2] These contractors generally will enjoy a competitive advantage over contractors that do not have access to GFP and, therefore, must include those costs in their offers.[3] Under current regulatory prescriptions, contractors are not supposed to receive subsequent contract awards as a result of an unfair GFP-related competitive advantage.[4] However, follow-on contracts are common because contracting officers are required to consider the costs and savings associated with furnishing GFP regardless of competitive advantage.[6] Nevertheless, to minimize the impact of this government-created advantage, the *Federal Acquisition Regulation* (*FAR*) prescribes procedures whereby the offers of contractors with access to GFP will be burdened in an attempt to offset this advantage. Specifically, the *FAR* requires the use of rental equivalent factors and the actual charging of rent to neutralize competitive advantage and ensure that award is made to the offeror whose bid or proposal represents the lowest true cost to the government.[6] This latter goal was the basis of the GAO's recommendation to the Secretary of the Navy in a 1965 opinion.[7] In that case, the invitation for bids (IFB) advised that, for pricing purposes, bidders should assume that the government would not be furnishing government tooling. The incumbent contractor, who had been using government tooling, submitted a bid assuming that it could continue using the tooling but stated in its bid that if the tooling was not provided, its bid would increase by the acquisition cost of similar tooling. Addition of the full acquisition cost would have made the incumbent the second lowest bidder. The incumbent argued that its bid should have been

---

[2] The issue of competitive advantage can arise through contractor use of any type of GFP, although contractors may be inclined to use some types of GFP more than others to gain an advantage. For example, unauthorized use of government-furnished equipment (GFE) installed on the contractor's production line is less detectable than depletion of government-furnished material (GFM) in the contractor's inventory. Nevertheless, competitive advantage issues are not limited to procurements involving any particular type of GFP.

[3] For example, contractors using GFE can reduce potentially expensive contract-related risks. A study by the Rand Corporation observed that "using GFE sidesteps two kinds of uncertainty: the possibility that procurement quantities may be reduced, and that another firm will obtain subsequent contract awards." Government-Owned Plant Equipment Furnished to Contractors: An Analysis of Policy and Practice, The Rand Corporation Memorandum RM-6024-1PR v (1969). This observation applies to all property with a high acquisition cost, especially when the property is of such a specialized nature that its cost could not be recovered through allocation to other work.

[4] *See* generally GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 45-2 (1 Apr. 1984) [hereinafter FAR] (Competitive Advantage).

[5] *Id.* 45.201(b).

[6] *See infra* text accompanying note 9.

[7] B-155691, Feb. 26, 1965, 1968 U.S. Comp. Gen. LEXIS 27, 1965 WL 2541 (C.G.).

increased only by the fair rental value of the tooling during the period of contract performance. The contracting officer was confronted with a situation where he was required, under the terms of the IFB, to award the contract to another bidder whose offer did not represent the lowest overall cost to the government. Consequently, the Comptroller General (Comptroller) recommended cancellation and reprocurement, reasoning:

> The method of evaluation prescribed by the subject IFB is based on the false premise that the Government must be willing to sacrifice potential savings equal to a bidder's cost of acquiring essential special tooling. Therefore, it appears that the language of the IFB evaluation clause is not designed to provide the Government the maximum benefit available from the property it had already paid for and could furnish to [the incumbent] for use in the instant procurement. . . .[8]

The current *FAR* provisions requiring either rental equivalents or the charging of rent should avoid these situations because they provide a more realistic assessment of the government's actual costs.

III. Nature of the Contracting Officer's Obligation

The FAR provides:

> (a) The contracting officer shall, to the maximum practical extent, eliminate competitive advantage accruing to a contractor possessing Government production and research property. . . . This is done by (1) adjusting the offers of those contractors by applying, for evaluation purposes only, a rental equivalent evaluation factor or, (2) when adjusting offers is not practical, by charging the contractor rent for using the property.[9]

Several situations exist where the contracting officer would not be obligated to take the remedial actions described in this provision because, under the circumstances, no competitive advantage arises from the contractor's use of government production and research property (GPRP). For example, when sole source contracting is appropriate, this provision would not apply.[10] Similarly, when GPRP is made available to all offerors, no competitive advantage requiring

---

[8] *Id.*

[9] FAR 45.201.

[10] *See generally* 10 U.S.C. § 2304(c) (1992); 41 U.S.C. § 253(c) (1992).

elimination is created. Confronted with a protest under these circumstances, the Comptroller reasoned:

> Thus, contrary to the protester's contention, the solicitation did not require that proposals be adjusted to take into account the government-furnished office space provided in section H-10; rather, it clearly informed offerors that cost proposals would not be adjusted on that basis since the same office space would be available to all offerors.[11]

Federal Acquisition Regulation 45.201 suggests that the contracting officer's obligation to eliminate competitive advantage is restricted to situations where offerors possess GPRP, as opposed to other types of GFP.[12] Stated as a mathematical equation, GFP minus GPRP equals material, agency peculiar property, and special tooling.[13] Strictly reading this provision, the FAR imposes no obligation on the contracting officer to eliminate—or even attempt to eliminate—competitive advantage arising from possession of GFP not included within the definition of GPRP. This seems at odds with FAR 45.102 which states the general policy with regard to ***all*** GFP as follows:

> **45.102** Policy
>
> [I]f contractors possess Government property, agencies shall—
>
> (a) Eliminate to the maximum practical extent any competitive advantage that might arise from using such property. . . .[14]

The nonspecific nature of this obligation suggests that the contracting officer is obligated to eliminate competitive advantage arising from contractor use and possession of ***any*** category of GFP.

While few recent cases consider this issue, under pre-Competition in Contracting Act (CICA)[15] decisions, contracting officers were not obligated to use rent or rental equivalents to eliminate a competitive advantage created when the government furnished government-owned, contractor-operated (GOCO) facilities[16] or "mate-

---

[11] SRS Technologies, B-238403, May 17, 1990, 90-1 CPD ¶ 484.

[12] *See supra* text accompanying note 9.

[13] This result is derived from a comparison of the definitions of the various types of GFP set forth at FAR 45.101 and FAR 45.201.

[14] FAR 45.102.

[15] The Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (amended several titles of the United States Code located at 10 U.S.C. §§ 2304-2305 and 41 U.S.C. §§ 253, 253a-g) [hereinafter CICA].

[16] *See* Crown Laundry & Dry Cleaners, Inc., B-220283, Jan. 14, 1986, 86-1 CPD ¶ 35; Crown Laundry & Dry Cleaners, Inc., B-204178, 61 Comp. Gen. 233 (1982).

rial."[17] In *Hydrosystems Inc.*,[18] the government intended to furnish "material" and the protester contended that the agency erred by including the awardee's proposal in the competitive range without adding a rental evaluation factor to the proposal price. The Comptroller distinguished between the contracting officer's obligation when material, as opposed to GPRP, is furnished. In denying the protest, the Comptroller stated that "Hydrosystems cites the RFP clause that provides for the addition of a rental factor for the rent free use of 'government production and research property'. . . . However, 'government production and research property' does not pertain to material or equipment being furnished for incorporation into the contract end product."[19] Because the Comptroller rendered this opinion prior to the enactment of the CICA, how the GAO would handle a situation where a clear competitive advantage is conferred by government property other than GPRP is presently unclear. While the CICA does not provide specific direction on this point, its general intent to foster fair competition and ensure that all offerors compete on an equal basis could be a factor in subsequent GAO opinions.[20] Various agencies have taken the initiative by encouraging contracting officer and Source Selection Boards to ensure that the competitive playing field is level, both in fact and appearance.21

The CICA may have been a factor in the GAO's opinion in *Yard-*

"Hydrosystems Inc., B-184176, Nov. 28, 1975, 75-2 CPD ¶ 358.

[18] *Id.*

[19] *Id.* This distinction also was made by the Comptroller General in E-Systems, Inc., B-191346, Mar. 20, 1979, 79-1 CPD ¶ 192. Unfortunately, the Comptroller also based his decision on the absence of prejudice to the protester. Consequently, the reader is left without a clear indication of the actual basis for the decision.

[20] On 2 June 1992, the author conducted an interview with Mr. Robert P. Murphy, Senior Associate General Counsel, General Accounting Office, to discuss this issue. Mr. Murphy felt that if GFF' confers a competitive advantage, even if it is not within the definition of GPRP, a viable protest may be asserted. He stated that in recent years the GAO has placed increased emphasis on the contracting officer's obligations to provide a level playing field. He reasoned that if the contracting officer was aware that a contractor possessed special tooling or material, and that he intended to use it rent-free in performing an upcoming contract, the contracting officer should include rent or a rental equivalent to evaluate the benefited contractor's offer. Mr. Murphy emphasized that this was his personal opinion and does not necessarily represent GAO policy.

[21] For example, *The Navy Competition Handbook* (1989) states:

> [T]he activities of Navy procurement personnel must reflect an unbiased desire for effective competition. Effective competition depends on several factors, principally: . . . A clear message that we are seeking competition, on a fair and level playing field. Similarly, a DOD IG report disclosed that: One buying command was not considering the value of Government-furnished silver before awarding competitive contracts. . . This command incurred about $175,000 in excess costs because it did not consider the value of Government-furnished silver in the low bid on a prime contract . . . . Department of Defense Inspector General Report No. 88-189 p. 26 (August 1988).

ney Battery Division, Yardney Electronic Corp.[22] In *Yardney,* the government was to furnish the contractor with silver that the contractor would incorporate into the batteries it was supplying. Under these circumstances, the silver qualified as "material."[23] The protester argued that the contracting officer should have evaluated the awardee's proposal by considering the cost of the government-furnished silver. Because the government agreed to provide all necessary silver at no charge, the protester argued that contractors proposing batteries with a high silver content were receiving a competitive advantage. The GAO could have summarily denied the protest by determining, as it did in *Hydrosystems Inc.*,[24] that the contracting officer had no obligation to eliminate competitive advantage arising from the awardee's use of government-furnished "material." However, the GAO apparently believed that the contracting officer should have considered the government's "material" costs because the GAO considered the impact of such an evaluation method. Nevertheless, the GAO denied the protest because the low offer remained the low offer even after adding the cost of the government-furnished silver and, therefore, no prejudice arose.

Thus, whether contracting officers are obligated to attempt to eliminate competitive advantage arising from the contractor's possession of GFP other than GPRP remains unclear. The most prudent course of action would be for contracting officers to attempt to eliminate competitive advantage created by the contractor's possession of any type of GFP. This would be a reasonable, although perhaps not required, attempt to level the playing field. That the GAO would consider such efforts an abuse of discretion is unlikely.

A. Exceptions to the Contracting Officer's General Obligation to Eliminate Competitive Advantage

Two exceptions to the contracting officer's obligation to "eliminate" competitive advantage are apparent. First, the GAO has interpreted this obligation to require a causal relationship between the GFP and the competitive advantage before the contracting officer becomes obligated to take remedial action. Second, if elimination of the competitive advantage is not cost effective, remedial efforts are not required.

"B-215349, Nov. 8, 1984, 84-2 CPD 1511.

[23] FAR 45.301 defines "material" as follows:

> **Property that may be incorporated into or attached to a deliverable end item or that may be consumed or expended in performing a contract. It includes assemblies, components, parts, raw and processed materials and small tools and supplies that may be consumed in normal use in performing a contract.**

Id.

[24] B-184176, Nov. 28, 1975, 75-2 CPD ¶ 358.

1. The GFP Must Confer an "Unfair" Competitive Advantage.—Neither regulation nor decisional law has required corrective action unless an "unfair" competitive advantage results from the contractor's possession of GFP. A competitive advantage will be "unfair" when only one offeror has access to the property. An advantage gained through prior use and experience with GFP is not an unfair advantage and requires no remedial action, provided that all contractors had an equal opportunity to use the property. In E-Systems, *Inc.*,[25] the awardee, GTE-Sylvania, had developed algorithms under prior government contracts that would be implemented and tested in systems to be developed in the subject contract. The protester, E-Systems, contended that the algorithms were GPRP and GTE-Sylvania's "possession" of them provided it with an unfair competitive advantage that the contracting officer did not attempt to eliminate. Although recognizing that GTE-Sylvania's development of the algorithms gave it a distinct advantage over other bidders, the Comptroller concluded: "There is no requirement to equalize this advantage unless it is the result of a preference or unfair action by the government. . . . This rule applies also to advantages gained through the performance of other contracts."[26] Thus, the GAO's position is that contractors can enjoy a variety of legitimate competitive advantages that do not obligate the contracting officer to take any corrective action.

Even if the contractor can establish that the awardee enjoyed an "unfair" competitive advantage, the GAO generally will not recommend a remedy unless application of rental factors to the awardee's bid would have resulted in award to the protester. In negotiated procurements, the GAO has demonstrated more flexibility but still seems to require proof that the application of rental factors would have significantly narrowed the gap between the awardee's proposal and that of the protester. This is merely a consequence of the GAO's long-standing requirement that protesters demonstrate prejudice.27 This requirement not only obligates the pro-

---

[25] B-191346, Mar. 20, 1979, 79-1 CPD ¶ 192.

[26] *Id.* at 203. See S.T. Research Corp., B-233309, Mar. 2, 1989, 89-1 CPD ¶ 223 ("[T]he government has no obligation to equalize a competitive advantage that a firm may enjoy because of its own particular business circumstances or because it gained experience under a prior government contract unless the advantage results from a preference or unfair action by the contracting agency"); State Mach. Prod., B-224260, Feb. 5, 1987, 87-1 CPD ¶ 123 ("[A] competitive advantage is improper only where the advantage results from preferential treatment of an offeror or other unfair action by the government. A competitive advantage accruing to an offeror due to other circumstances need not be equalized in favor of the other offerors"); Lanson Indus. Inc., B-202942, Aug. 26, 1981, 81-2 CPD ¶ 176 (contracting officer has no obligation to eliminate a competitive advantage not caused by the contracting agency).

[27] *See* Splendid Dry Cleaners, B-220141.2, Dec. 24, 1985, 85-2 CPD ¶ 711, where the second low bidder (who proposed using a GOCO) protested that the evaluation factor added to his bid, to reflect the costs of the GOCO facility, was too high. The

tester to demonstrate that the awardee's use of GFP conferred an unfair competitive advantage but also obligates the protester to show that it would have had a realistic chance for award if that competitive advantage had been neutralized. In *Sechan Electric, Inc.*,[28] the protester established that the awardee enjoyed an "unfair" competitive advantage because no other contractor had access to the GFE in the awardee's possession. The protester argued that the government's calculation of the rental equivalent factor was inaccurate and, if the calculation had been accurate, its Best and Final Offer (BAFO) would have been lower than the awardee's. The Comptroller nevertheless denied the protest because the awardee's technical scores were so superior that it would have been awarded the contract notwithstanding its higher price. Thus, although FAR 45.201 obligates the contracting officer to eliminate competitive advantage to the "maximum practical extent," if the contracting officer fails to do so, protesters will have no remedy unless they can prove that the use of the GPRP conferred a competitive advantage on the awardee and that absent this advantage, the protester would have received the award.[29]

2. *Elimination of Competitive Advantage Not Required* ***Unless*** *Cost-Effective for the Government.—The* second exception to the contracting officer's obligation to eliminate competitive advantage is the ***FAR*** requirement that costs and savings to the government be evaluated notwithstanding the existence of a competitive advantage. Federal Acquisition Regulation 45.201(b) provides that, "In evaluating offers, the contracting officer shall also consider any costs or savings to the government related to providing such property, *regardless of any competitive advantage that may result*."[30] This policy seems to be consistent with that stated at FAR 45.102, which provides in relevant part: "However, if contractors possess government property, agencies shall—(a) Eliminate to the maximum *practical* extent any competitive advantage that might arise from using such property; [and] **(b)** Require contractors to use government

government was using the total cost of operating the *GOCO* during the contract period and the protester argued that the government only should have considered the difference between the facility's cost when idle compared to its cost when operational. The GAO denied the protest because the awardee was also a *GOCO* contractor and the same evaluation factor was added to his bid; therefore no prejudice arose. ***See*** also Department of **Labor, B-214564-2,** Jan. **3, 1985, 85-1** CPD ¶ **13;** Columbia Inv. Group, **B-214324,** Dec. 6, **1984, 84-2** CPD **1632;** D & P Transp., Inc., **B-190735,** July **14, 1978, 78-2** CPD **137** and Gadsby, Maguire, Hannah and Merrigan, **B-169569, 1966** CPD ¶ **112.**

[28] B-233943, July **18, 1989, 89-2** CPD ¶ 59.

[29] ***See, e.g.***, Yardney Battery Div., Yardney Elec. Corp., **B-215349,** Nov. **8, 1984, 84-2** CPD ¶ **511** ("We therefore cannot conclude that Yardney was prejudiced by the Navy's failure to evaluate the cost of government-furnished silver, and its protest on this basis is denied.").

[30] ***See*** FAR, *supra* note **4,** at 45.201(b) (emphasis added).

property to the maximum *practical* extent in performing government contracts."[31] Under these provisions the contracting officer must attempt to eliminate competitive advantage only to the extent that it is "practical" to do so. Reading these two provisions together, the elimination of competitive advantage is practical if it can be accomplished at a cost that does not exceed the government's expected net savings arising from the contractor's use of the GFP. If the costs of eliminating the advantage exceed the government's anticipated savings, no remedial action is required and, most importantly, the GFP may be furnished "regardless of any competitive advantage that may result."[32] However, in most cases, the costs of eliminating competitive advantage would consist only of the administrative cost of calculating rent or rental equivalents and evaluating proposals based on that calculation. Whenever the government's expected net savings from furnishing GFP exceed these costs, FAR 45.102 requires that the contracting officer attempt to eliminate the competitive advantage.

Within the parameters of the two exceptions discussed above, the contracting officer is obligated to eliminate competitive advantage to the maximum practical extent. A contractor's possession of GPRP confers competitive advantages both before and after award. Before award, the costs saved in not having to purchase or lease similar property can reduce the contractor's bid or proposal price. After award, the contractor using GFP enjoys greater liquidity and a more favorable cash flow because the contractor avoided the expense of purchasing the property. Part 45.2[33] of the *FAR* addresses pre-award competitive advantage whereas part 45.4[34] addresses postaward procedures.

IV. Pre-Award Competitive Advantage

As noted above,[35] the *FAR* provides a two-part prescription for eliminating pre-award competitive advantage. The preferred approach is the addition of a rental equivalent factor to the offers of contractors proposing to use GFP. If this method is not "practical," the contracting officer must charge the contractor rent for using the GFP.[36] This latter approach apparently is based on the assumption that the offeror will increase its offer by the amount of the antici-

---

[31] *Id.* 45.102 (emphasis added).

[32] *Id.* 45.201(b).

[33] *Id.* 45.2.

[34] *Id.* 45.4.

[35] *See supra* text accompanying note 6.

[36] *See supra* text accompanying note 5.

pated rents, thereby having an effect similar to the addition of a rental equivalent factor under the preferred method.[37] To achieve this result, the rent specified in the solicitation should be the same as the rental equivalent factor that would have been used if practical. This is required by the *FAR*.[38]

Federal Acquisition Regulation **45.201** provides some indication of when using a rental equivalent factor would not be "practical," stating: "Applying a rental equivalent factor is not appropriate in awarding negotiated contracts when the contracting officer determines that using the factor would not affect the choice of contractors."[39] This guidance is difficult to implement during presolicitation planning. Federal Acquisition Regulation **45.205** states that "the solicitation shall describe the evaluation procedures to be followed, including rental charges or equivalents."[40] How can the contracting officer know whether the rental equivalent factor will affect the choice of contractors before any proposals are received? Further, contracting officers apparently cannot "play it safe" by advising offerors that either a rental equivalent or actual rent will be used to neutralize competitive advantage, because the use of the disjunctive in FAR **45.205** indicates that the contracting officer must specify one or the other in the request for proposal (RFP). If the RFP states that a rental equivalent factor will be used and, after receipt of proposals, the contracting officer determines that use of rental equivalents will not affect the choice of contractors, the contracting officer will be

---

[37] While it is reasonable to assume that contractors will include anticipated rents in their offers, they are not obligated to do so. Contractors may elect to absorb such future rents to make their offers more competitive, because the government will not add a rental equivalent factor when "adjusting offers is not practical." FAR 45.201.

[38] The FAR states as follows:

> FAR 45.202-1 Rental Equivalents—
>
> If a rental equivalent evaluation factor is used, it shall be equal to the rent allocable to the proposed contract that would otherwise have been charged for the property, as computed in accordance with the clause at 52.245-9, Use and Charges.
>
> FAR 45.202-2 Rent—
>
> If using a rental equivalent factor is not practical, and the competitive advantage is to be eliminated by charging rent, an offeror or subcontractor may use government production and research property after obtaining the written approval of the contracting officer having cognizance of the property. Rent shall be charged in accordance with 45.403.

(emphasis added) [Note: FAR 45.403 provides that rent shall be calculated in accordance with the Use and Charges Clause at 52.245-9].

[39] FAR 45.201(a). This section does not mention sealed bid procedures—presumably because, unlike in negotiated procurements, no competitive range determination in which the contracting officer must determine each offeror's chances for award exists. Thus, in sealed bidding procurements when GFP is likely to confer a competitive advantage, the contracting officer should specify in the IFB that rental equivalents will be used to offset that advantage.

[40] *Id.* 45.205 (emphasis added).

inviting protests if he or she decides not to follow the evaluation plan specified in the RFP. The best practice is for the contracting officer to state in the RFP that rental equivalents will be used, unless their use will not affect the choice of contractors. This fully apprises potential offerors of the evaluation scheme.

As a practical matter, the contracting officer should only forego the use of rental equivalents when their use clearly would not affect the choice of contractors. Use of rental equivalents in close cases levels the competitive playing field. This conservative approach also reduces the opportunity for unsuccessful offerors to speculate about the effect that the GFP had on the award. Ideally, this approach would minimize the incidence of protests. Of course, if the contracting officer decides not to use a rental equivalent factor, a protester still would have the burden of demonstrating that it was prejudiced by the contracting officer's decision.

A. Solicitation Requirements

Solicitations, whether for advertised or negotiated contracts, generally are required to follow the Uniform Contract Format.[41] Under these guidelines, the solicitation must state the evaluation factors for award. When the contracting officer intends to furnish GPRP, the solicitation must describe the evaluation factors to be used.[42] In this context, the contracting officer generally will describe the rental charges or equivalents[43] and other costs and savings.[44]

1. General ***Requirements.***—The solicitation requirements applicable when GPRP is available are designed to furnish offerors with information—such as the evaluation procedure to be used—and obtain information from the contractor—such as what government property the offeror proposes to use.[45]

---

[41] *See id.* 14.201-1 (regarding advertised contracts); FAR 15.406-1 (regarding negotiated contracts). Several regulatory exceptions to this general rule exist–for example, solicitations pertaining to construction and shipbuilding need not follow the Uniform Contract Format.

[42] *Id.* 45.205(a). The statutory bases for the contracting officer's obligation to specify evaluation factors in the solicitation are located at 10 U.S.C. § 2305(a)(2) (1992) and 41 U.S.C. § 253(b) (1993).

[43] FAR 45.201(a).

[44] *Id.* 45.202-3.

[45] *Id.* 45.205 imposes the following requirements:

> (b) The solicitation shall describe the evaluation procedures to be followed, including rental charges or equivalents (see 45.202) and other costs or savings to be evaluated (see 45.202-3), and shall require all offerors to submit with their offers the following information:
>
> (1) A list or description of all government production and research property that the offeror or its subcontractors propose to use on a rent-

The intent of FAR **45.205** is that the information provided by the offerors will assist the contracting officer by indicating how much GPRP may be used on the contract, thereby enabling the contracting officer to determine an appropriate rent or rental equivalent factor. However, the degree of trust placed in the offerors is greater than what would be expected in most commercial transactions. Nondisclosure of GPRP surreptitiously benefits contractors because they may succeed in using GPRP in their possession without paying rent or having their offers burdened with a rental equivalent factor. Nondisclosure theoretically makes their offers more competitive and increases profitability. The temptation not to disclose is substantial because the risk of detection is de minimus, or at least is perceived to be so.[46] Nevertheless, by requesting the information, the government attempts to fulfill its obligation to ensure fair competition and also establishes a predicate for liability under the False Statements Act,[47] if the offeror decides to chance nondisclosure.

Materiality of the nondisclosure is an element of the offense under the False Statements Act. However, if the offeror, at the time of award, possesses GFP that it does not intend to use on the awarded contract, its nondisclosure of the mere fact of possession is arguably not "material." In contrast, if the contractor later decides to use this GFP on the contract and fails to make a postaward request for such use, materiality will be established more easily. In the latter scenario, the contractor receives an economic benefit from

---

free basis. The list shall include property offered for **use** in the solicitation, **as** well **as** property already in possession of the offeror and its subcontractors under other contracts.

(2) Identification of the facilities contract or other instrument under which property already in possession of the offeror and its subcontractors is held, and the written permission for its **use** from the contracting officer having cognizance of the property.

(3) The dates during which the property will be available for **use** (including the first, last, and all intervening months) and, for any property that will be used concurrently in performing two or more contracts, the amounts of the respective **uses** in sufficient detail to support proration of the rent.

(4) The amount of rent that would otherwise be charged, computed in accordance with **45.403.**

[46] *See* **137 CONG. REC. S11757-01** where Senator John Glenn observed: "In March **1988,** we reviewed [the] **DOD's** loss of control over tens of billions of dollars of property furnished to government contractors. There wasn't even an inventory kept of it."

[47] **The** False Statements Act, **18** U.S.C. **§ 1001 (1992)** provides as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall **be** fined not more than **$10,000** or imprisoned not more than five years or both.

the nondisclosure by depriving the government of the opportunity to collect a "fair rental or other adequate consideration" for the use of the GFP.[48] Further, this unauthorized use violates the section of the standard GFP clauses stating that "the government property shall be used only for performing this *contract,* unless otherwise provided for in this contract or approved by the Contracting Officer."[49] Nondisclosure in circumstances where a duty to disclose exists is material if the omission has a natural tendency to influence the actions of a federal agency.[50] Because the contractor's nondisclosure of its intent to use GFP causes the government to forego collection of a "fair rental," materiality can be readily established.[51]

Further, the contractor's unauthorized use of GFP could result in termination for default of the contract under which the property was furnished because this unauthorized use violates a term of the prior contract.[52]

Finally, an offeror's failure to disclose the specified information or provide the required contracting officer authorization is relevant in determining a bid's responsiveness.[53] These failures, if detected in

---

[48] In situations involving special tooling or special test equipment, section 45.203 of the FAR mandates collection of a fair rental or other adequate consideration:

> 45.203 Postaward utilization requests—
> When after award, a contractor requests the use of special tooling or special test equipment, the administrative contracting officer shall obtain a fair rental or other adequate consideration if use is authorized. The value of the items, if known, and any amount included for them in the contract price shall be considered.

[49] FAR 52.245-2(d); FAR 52.245-5(d) (emphasis added).

[50] *See* United States v. Krause, 507 F.2d 113 (5th Cir. 1975); United States v. DiFonzo, 603 F.2d 1260 (7th Cir. 1979), *cert. denied,* 444 U.S. 1018 (1980).

[51] In United States v. McIntosh, 655 F.2d 80 (5th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982), the court of appeals opined that a false statement is material if it has a "natural tendency" to influence the government's decision to act or refrain from acting. Actual deception, a loss suffered by the government, or any actual reliance on the misrepresentation is not required.

[52] *See* FAR 52.245-2(d); FAR 52.245-5(d). The basis for default termination is provided at FAR 52.249-8(a)(1)(iii) (Fixed-Price Supply and Service).

[53] The *FAR* deals with responsiveness and materiality as follows:

> 14.301 Responsiveness of Bids.
> (a) To be considered for award, a bid must comply in all material respects with the invitation for bids. . . . A deviation will be considered immaterial if it has only a negligible effect on price, quantity or quality when viewed in the context of the entire procurement (FAR 14.405). Since the use of GFP will generally enable the bidder to reduce his bid price, nondisclosure of intent to use GFP or the failure to provide required contracting officer authorization, should generally be considered "material." Contracting officers desiring to avoid protests should find bids conditioned on use of GFP non-responsive.

FAR 14.301.

time, are a basis for finding a bid nonresponsive.[54] The GAO has upheld a contracting officer's determination of responsiveness where the FAR-required authorization complied substantially, although not exactly, with the IFB's requirements.55

In negotiated procurements, the contracting officer can decide to include a proposal in the competitive range even though it does not include the required authorization.66 The rationale in these cases is that authorizations and lists of GFP proposed for use can be submitted during negotiations. Thus, even after BAFOs are submitted, omission of an authorization or proposed list of GFP will not necessarily result in rejection. Accordingly, the contracting officer's decision to reopen discussions, as opposed to seeking clarification, has been upheld.[57]

If an offeror does not disclose its possession of GFP, or the extent of GFP in its possession, the GAO is reluctant to speculate as to the offeror's future intentions for this property. At least one GAO decision indicates that it will not consider a protester's allegation that the awardee had an unfair competitive advantage because it

---

[54] *See* James R. Parks Co., **B-186699,** Oct. **22, 1976, 76-2** CPD **1360.** In a sealed bid contract involving **$600** worth of **GFP,** the GAO concluded that

> [T]he [offeror's] failure to comply with the conditions of the IFB, which required written authorization for use of government-owned property to be submitted before bid-opening, renders the bid non-responsive regardless of the amount or value of the property involved. Such a bid cannot be accepted under 10 U.S.C. § 2305(c).

Accord Duro Life Corp., **B-214031,** June **18, 1984, 84-1** CPD **1636,** where the GAO upheld the contracting officer's decision to find a bid nonresponsive because the bid was conditioned on using GFP in the bidder's possession under another contract. ***But*** see Optic-Elec. Corp., **B-204402,** Feb. **9, 1982, 82-1** CPD **¶ 113,** where the **IFB** required that authorization *exist* prior to bid opening but did not require that it be submitted with the bid. The contracting officer ascertained, after bid opening, that proper authorization existed prior to opening and his determination of responsiveness was upheld by the GAO.

[55] Optic-Elec. Corp., **B-204402,** Feb. **9, 1982,** 82-1 CPD **¶ 113 (IFB** required bidders to submit an authorization from the contracting officer cognizant of the property to be used and to specifically identify the property. The authorization submitted by the awardee referred to property identified on the "attached list." Although no list was attached to the authorization, the bid did identify the property that the awardee intended to **use.** The Comptroller upheld the contracting officer's determination that the bid substantially complied with the IFB's requirements).

[56] Self-Powered Lighting Ltd., **B-195935,** Feb. **20, 1980, 80-1** CPD **¶ 145.**

[57] *See* Mine Safety Appliances (MSA); Racal ***Corp.,*** **B-233268.4,** Jul. **14, 1989, 89-2** CPD **146,** where MSA received the award and Racal protested, contending that MSA intended to use GFP and failed to submit the required contracting officer authorization. The agency reopened negotiations because it determined that this omission was material because a rental equivalent factor would have to be added to MSA's proposal if it was authorized to use GFP. On reevaluation, the agency awarded to Racal and MSA protested the agency's decision to reopen negotiations. The GAO upheld the agency's decision, agreeing that whether MSA had access to GFP **was** material because this access affected MSA's proposal price. (Note that Defense Federal Acquisition Regulation (DFARS) **215.611(c)** severely restricts the contracting officer's authority to reopen discussions after requesting BAFOs).

possessed GFP under other contracts and reduced its offer price in anticipation of its unauthorized rent-free use of that property in the subject contract.[58] Thus, although the awardee failed to disclose its possible future use of government property, the GAO views unauthorized future use as a matter of contract administration, which it customarily refuses to review.[59] Notwithstanding the GAO's "hands-off" policy, a contractor's failure to disclose its possession of GFP could subject it to termination for default.

Difficulties can arise even when offerors properly identify GFP in their possession and include the required authorizations in their offers. In this situation, although the government is receiving what it perceives to be "adequate consideration,"[60] disappointed offerors nevertheless may argue that the amount charged the awardee is unrealistically low in relation to the GFP furnished. These disappointed offerors contend that their offers were adversely affected because the rent charged the awardee is significantly less than the allocable acquisition costs of similar contractor-owned property. Contracting officers can rebut these contentions by ensuring that the rent charged is determined in accordance with the formula specified in the Use and Charges Clause.[61]

Thus, notwithstanding the GAO's refusal to speculate about a contractor's postaward intentions for GFP in its possession, ample incentives exist, for both the contractor and the government, to fully disclose and discuss all GFP that foreseeably could be used on the contract.

2. *Failure to Specify Rent Charges or Rental Equivalents.*— When the solicitation fails to indicate the rent or rental equivalent factors that the contracting officer intends to use, the GAO will consider all the facts and circumstances to determine if this failure prejudiced a protestor. In *Gadsby, Maguire,* Hannah *and Merrigan*,[62] the eventual awardee possessed a government-owned facility (a tank manufacturing plant) and the contracting officer knew that this offeror expected to use the facility on a rent-free basis. The RFP's government-furnished property schedule did not list the facility and the contracting officer failed to respond to the protester's pre-BAFO inquiry concerning whether the contracting officer would make this facility available. Nevertheless, the contracting officer applied a rental equivalent factor to the awardee's proposal based on an appraisal by the local Board of Realtors. The GAO noted that the

---

[58] State Mach. Prods., B-224260, Feb. 5, 1987, 87-1 CPD ¶ 123.

[59] *Id.* See Optic-Elec. Corp., B-204402, Feb. 9, 1982, 82-1 CPD ¶ 113.

[60] FAR 45.401.

[61] *Id.* 52.245-9.

[62] B-159569, Nov. 18, 1966, 66-1 CPD ¶ 112.

contracting officer should have amended the **RFP** to inform all offerors that the facility would be available to one offeror and should have specified the rental equivalent factor to be applied to that offeror's proposal. However, because no similar facility could have been made available to the protester to equalize competition and no challenge to the propriety of the rental equivalent factor used by the contracting officer was submitted, the **GAO** found no prejudice and denied the protest. The protester also argued that it based its proposal partly on its estimation of the prices included in the other proposals and that it was prejudiced by the government's failure to disclose the awardee's access to the government facility. The Comptroller rejected this contention because the contracting officer determined that the fair rental for the facility was $75,000 and the difference between the protester's proposal and that of the awardee was $2,500,000. Thus, although the procurement was flawed, the **GAO** did not grant relief because the protester failed to show prejudice.[63]

3. Use of Alternate Rent Formulae.—Despite the *FAR*'s requirement that rent and rental equivalents be computed in accordance with the Use and Charges Clause,[64] recent cases demonstrate that the contracting officer is not obligated to use this particular formula. In *Accudyne Corp.*,[65] which involved a requirements contract, the contracting officer modified the formula specified in the Use and Charges Clause to calculate the rental factor on a per unit basis. The **GAO** noted that this evaluation approach was identified in the **RFP** and upheld the contracting officer's determination that the modified formula was more appropriate for a requirements contract than the formula specified in the Use and Charges Clause.[66] However, because *Accudyne Corp.* involved only a slight modification of the formula, no clear indication of how far a contracting officer may stray without obtaining an approved deviation exists.[67]

The use of alternative means for mitigating competitive advantage also arises in situations when only some offerors have access to **GOCO** facilities. Because these offerors are not incurring ownership or lease expenses for these facilities, contracting officer action is required to eliminate this competitive advantage "to the maximum

---

[63] The *Gadsby* opinion was decided under section 13-506 of the *Armed Services Procurement Regulation (ASPR)* which was substantially equivalent to section 45.205(b) of the current *FAR*.

[64] *See supra* note 38; FAR 45.403.

[65] B-237987, Apr. 3, 1990, 69 Comp. Gen. 379, 90-1 CPD ¶ 356.

[66] *Id.*

[67] FAR Subpart 1.4 describes the policies and procedures for obtaining deviations. The agency head or designee may authorize individual deviations and this approval must be filed with the *FAR* Secretariat.

practical extent." In *Crown Laundry & Dry Cleaners Inc.*,[68] the IFB stated that the bids of contractors in possession of GOCO facilities would have their bids adjusted according to Office of Management and Budget (OMB) Circular A-76, which is based on the government's acquisition cost minus depreciation. The protester argued that the A-76 adjustment was too low and that if the rental equivalent factor specified in the FAR were used, the protester would be the low bidder. The Comptroller rejected the protest because the IFB specified use of the A-76 evaluation procedure and had been upheld by the GAO in previous cases. Although the protest ultimately was dismissed because it was filed after bid opening, the Comptroller had no objection to the use of the A-76 procedure to eliminate the competitive advantage when GOCO facilities are provided.

A critical element in both the *Accudyne* and *Crown* decisions was that the evaluation method specified in the solicitation and the method actually used were the same. Compare *NI Industries, Inc.*,[69] where the RFP stated that a rental equivalent factor would be calculated based on the period of use specified by the offeror. The protester specified a five-month use period but the Army calculated the rental evaluation factor based on a ten-month period, significantly increasing the protester's evaluated price. The Comptroller sustained the protest and observed, "While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation."[70] Thus, according to the Comptroller, the contracting officer may structure evaluation methods to accommodate particular circumstances, notwithstanding the *FAR*'s express preference for calculation in accordance with the Use and Charges Clause. The GAO's chief focus, given its concern with the fairness of the competitive process, is whether the evaluation method actually used was disclosed in the solicitation.[71]

4. Distinguish Use of Rental Formulae Used to Eliminate Com-

---

[68] B-220283, Jan. 14, 1986, 86-1 CPD ¶ 35.

[69] B-218019, Apr. 2, 1985, 85-1 CPD ¶ 383.

[70] *Id.*

[71] Although NI Industries, Inc., involved a pre-CICA contract, the GAO, in its decisions involving post-CICA contracts, has demonstrated an even greater concern with the fairness of the evaluation process. *See* Glen Indus. Communications, Inc., B-248223, May 19, 1992, 92-1 CPD ¶ 453 (protest sustained because agency invited front-loaded offers but then rejected protestor's offer *became* it was front-loaded); and Multi-Spec Prods. Group, B-245156.2, Feb. 11, 1992, 92-1 CPD ¶ 171 (protest sustained because agency improperly waived a first article testing requirement for awardee). While the actual evaluation plan need not precisely mirror that contained in the solicitation, it is well-settled that a "reasonable relationship" must exist between the factors stated in the solicitation and the factors actually used. *See, e.g.*, Avogadro Energy Sys., Inc. B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229.

petitive Advantage and Actually Charging of Rent After Award.— Specifying rent or a rental equivalent in the solicitation does not obligate the contracting officer to charge rent after award. In *National Eastern Corp.*,[72] the RFP required offerors to enter into rental agreements covering any government property the offerors intended to use. The eventual awardee, Amron, possessed government property and entered into the required agreement and, presumably, adjusted its offer price accordingly. During negotiations, the government decided to reduce the overall contract price by allowing rent-free use. Consequently, Amron reduced its proposal by the amount of the agreed upon rental. The protester argued that the rental charge was unrealistically low (by $3141) and that this amount represented a cost to the government that should have been added to Amron's proposal as a rental equivalent factor. In rejecting this argument, the GAO distinguished between protests based on allegedly "improper" rents and those based on inaccurate rental equivalent factors:

> We disagree with your position that Amron's offer, which included rental arrangements, should have been increased for evaluation purposes. Amron's offer was firm and its liability was fixed for payment of rent at the correct monthly rate. This is all that [is required] . . . for elimination of the competitive advantage that might arise from the use of Government equipment, ***and the total amount of rent which may be involved is material for evaluation purposes only*** when ***rental equivalents are to be used instead of charging of rent***.[73]

The presumption underlying this reasoning is that when actual rents are anticipated, contractors independently will include their own "rental equivalent factor" in their offers. However, the opinion is stated in unnecessarily broad terms. To suggest that quantum is immaterial when actual rents are to be charged is inaccurate. Federal Acquisition Regulation 45.403 specifies that rent is to be calculated in accordance with the Use and Charges Clause. In a situation like *National Eastern*, if this mandate is not followed and the government charges a nominal rent, offerors probably would include only a nominal amount in their offers. If the contracting officer decided to allow rent-free use, only a nominal amount would be deducted from affected offers and the awardee would be allowed to use the government property virtually rent-free without having its proposal burdened with a rental equivalent factor. In these situations, the GAO should determine whether the rent was initially cal-

---

[72] B-171591, 17 Gov't Cont. Rep. (CCH) ¶ 80,896, 1971 WL 4936 (CG) (1971).

[73] *Id.* (emphasis added).

culated as required and, if it was not, whether there was any prejudicial impact.

Thus, although the FAR imposes disclosure requirements on both parties, the GAO has allowed contracting officers to exercise reasonable discretion. The GAO will not sustain bid protests unless the protester can establish that the contracting officer abused his or her discretion resulting in prejudice to the protester.

B. Other Costs and Savings

When the contracting officer intends to offer GPRP for use, the contractor generally is expected to assume the costs of preparing the property for use.[74] However, the FAR recognizes that furnishing GPRP may result in either costs or savings to the government and requires that these effects be considered in evaluating bids or proposals.[75] Federal Acquisition Regulation 45.202-3 provides:

> (a) If furnishing Government production and research property will result in direct measurable costs that the Government must bear, additional factors shall be considered in evaluating bids or proposals. These factors shall be specified in the solicitation either as dollar amounts or as formulas and shall be limited to the cost of—
>
> (1) Reactivation from storage;
> (2) Rehabilitation and conversion; and
> (3) Making the property available on an f.o.b. basis.
>
> (b) If, under the terms of the solicitation, the contractor will bear the transportation cost of furnishing Government production and research property or the cost of making it suitable for use (such as when property is offered on an 'as is' basis (see 45.308)), no additional evaluation factors related to those costs shall be used.
>
> (c) If using Government production and research property will result in measurable savings to the government, the dollar amount of these savings shall be specified in the solicitation and used in evaluation offers. Examples of such savings include—

---

[74] *See* FAR 45.205(a).

[75] *Id.* 45.202-3. Various agency Source Selection Handbooks include this requirement to ensure that these costs are considered. For example, the NASA Source Selection Handbook (1988) states that "the probable cost should reflect the SEB's best estimate of the cost of any contract which might result from that offeror's proposal, including any recommended additions or reductions in personnel, *equipment*, or *materials*." (emphasis added). *See also* DEP'T OF AIR FORCE, AIR FORCE REG. 70-15, FORMAL SOURCE SELECTION FOR MAJOR ACQUISITIONS (Apr. 1988).

> **(1)** Savings occurring as a direct result of activating tools being maintained in idle status at known cost to the Government; and
> **(2)** Avoiding the costs of deactivating and placing tools in layaway or storage or of maintaining them in an idle state, if the prospective costs are known. For these costs to be included in the evaluation, firm decisions must have been made that the tools will be laid away or stored if not used on the proposed contract and that such costs are not merely being deferred.76

Despite the mandatory language of this provision, the contracting officer has discretion in deciding whether to include the specified costs and savings as evaluation factors. In ***Ensign** Bickford **Co.***,[77] the GAO upheld a contracting officer's decision not to include as an evaluation factor the cost of transporting government-furnished aluminum cans because the contracting officer reasonably determined that the cost could not be accurately ascertained.

Considering these costs and savings in source selection can frustrate the general intent of FAR Subpart **45.2** by conferring a competitive advantage on contractors in possession of GPRP.[78] The government will not incur costs to make the property available for delivery to these offerors. However, offerors that do not possess GPRP would be disadvantaged because their offers would have to be burdened to account for the government's costs of making the property available—that is, the costs of reactivation from storage and preparation for transportation, among others. Rental equivalents and rental charges would not necessarily offset this effect because they are aimed only at eliminating the advantage conferred as a consequence of the acquisition costs saved by the contractor using GPRP. Thus, the potential exists for conflict between the contracting officer's obligations to eliminate competitive advantage while also ensuring that the award goes to the contractor whose offer is the most advantageous to the government. The ***FAR*** attempts to reconcile this conflict by only obligating the contracting officer to eliminate competitive advantage to the maximum practical extent.[79] Thus, contracting officers have the discretion to determine when the costs of eliminating a competitive advantage outweigh the benefits

---

[76] FAR 45.202-3.

[77] B-180844, Aug. 14, 1974, 74-2 CPD ¶ 97.

[78] If all offerors have equal access to the GFP, the costs or savings to the government will be approximately the same regardless of which offeror gets the award. In this situation, no potential conflict exists with the policy of eliminating competitive advantage because no such advantage arises.

[79] FAR 45.201(a).

and the GAO will not disturb this decision unless the decision is found to be arbitrary and capricious.

V. Post-Performance Retention and Use of Government-Furnished Property

Concerning contractor retention of GFP after contract completion, Admiral H.G. Rickover stated:

> What usually happens is that initially the government probably has a real need to put government-owned machine tools in a particular supplier's plant. Often, after a few years this need passes. However, as other contracts are placed with the supplier, government contracting officials authorize him to use the government-owned tools on the new work on the basis that the government should get its money's worth out of the tools. . . . Once a company gets the government to provide him with machine tools, he almost certainly can keep them forever.[80]

The preceding section of this article considered the direct impact of various types of GFP on the competitive award process. This section will determine what impact the use of GFP has on the overall efficiency of the contractor's organization. While this impact may affect the competitive process, any effect would be too indirect and speculative to require corrective action.

The contractor with access to GFP enjoys several advantages as the result of not incurring purchase or leasing costs for similar property.[81] In addition to these cost-based advantages, use of GFP reduces the contractor's risk in its government contracts. When the contractor's own equipment fails to function properly, the contractor bears the risk that this failure will cause untimely performance resulting in termination for default. Conversely, when government property fails to function as intended, any resulting delay generally is excusable.[82]

---

[80] *Department of Defense Appropriations Act of 1967, Hearings Before the House Subcomm. on Department of Defense Appropriations of the Appropriations Comm.,* 89th Cong., 2d Sess. 171-72. As most readers will appreciate, Admiral Rickover was not a friend to DOD contractors.

[81] *See supra* Section I (discussion of advantages resulting from the nonincurrence of purchase or leasing costs),

[82] *See* FAR 52.245-2(a)(2):

> (2) The delivery or performance dates for this contract are based upon the expectation that government-furnished property suitable for use . . . will be delivered to the Contractor at the times stated. . . .

See also FAR 52.245-5(a)(3); FAR 52.245-7(k)(4).

A long-standing disagreement exists between federal agencies and industry whether postaward use of GFP actually confers an advantage in all cases. In a **1971** report to the Commission of Government Procurement, the study group observed that:

> Representatives of industry advised us that real-life situations are even more complicated than the cumbersome regulation procedures recognize. For example, as a piece of equipment gets older, the costs of upkeep and the costs of keeping accountability reports for the Government may more than offset any advantage derived by the contractor using the equipment. Industry representatives also complained that it is very difficult to negotiate fair rental rates for equipment when it is unknown how much actual use it will be put to.[83]

Leading industrial organizations still contend that the contractor's costs of managing GFP is unduly burdensome. In response to President Bush's memorandum of January **28, 1992,** directing agencies to identify inefficient procurement procedures, the Office of Federal Procurement Policy (OFPP) requested input from industry. The Aerospace Industries Association (AIA) objected to FAR Subpart **45.5,** which requires contractors to develop and implement internal procedures to prevent unauthorized use of the property and to provide a basis for calculating a fair rental. The AIA contended that contractors were required to expend excessive time and money conducting continuous analysis and reporting, none of which improved the quality of the end item received by the government.[84] Essentially, contractors want to continue to have access to GFP but want to be relieved of the recordkeeping duties that benefit the government. Nevertheless, in the interests of streamlining the procurement process, the Defense Acquisition Regulation (DAR) Council, on February **16, 1993,** agreed to a final rule revising FAR **45.505,** Records of Plant Equipment, to clarify that summary records normally are adequate for plant equipment costing less than **$5000** per unit.[85]

Thus, both advantages and disadvantages to the contractor's postaward use of GFP are apparent. Federal Acquisition Regulation Subpart **45.4** sets forth the procedures governing the contractor's postaward use of GFP and the appropriateness of charging of rent

---

[83] Study Group #6, *Pre-Contract Planning,* **an Advisory Report to the Commission on Government Procurement 148–49 (1971) (on file at the Government Contract Law Library at George Washington University, Washington', D.C.).**

[84] *See generally Associations Identify* **Burdensome** *Regulations for OFPP—The Contracting Process,* **THE** GOV'T CONTRACTOR, **34: 16, at 5 (1992).**

[85] **Army Defense Acquisition Regulation (DAR) Council Members' Report, DAR Case 91-019 (16 Feb. 1993) (on file at the DAR Council, Pentagon, Washington, D.C.).**

for that use. Because postaward use only tangentially impacts the competitive process and is interrelated with the contractual rights and liabilities of the parties, this matter is beyond the scope of this article.

VI. Conclusion

This article considered the various effects that GFP can have on the competitive process and the contractor's organization. One lesson that emerges from this effort is that the contracting officer is often in a "lose-lose" situation whenever offerors perceive that a competitor enjoys a GFP-related advantage. If the contracting officer fails to attempt to eliminate this advantage, unsuccessful offerors will complain; if he uses the *FAR* prescribed methods in an effort to eliminate the advantage, unsuccessful offerors still will complain. As the cited cases illustrate, offerors generally have not been successful in challenging the contracting officer's decisions on this issue. To minimize the likelihood of a successful protest, contracting officers should be alert to situations where offerors have unequal access to government property. In these cases, the contracting officer should determine whether this unequal access has created an unfair advantage. If an unfair advantage is identified, the contracting officer must determine if elimination of the advantage is "practical." The contracting officer then must attempt to eliminate the advantage through application of rental equivalents or by charging rent or prepare a written explanation of why elimination of the advantage was impractical.

ANOTHER VICTORY IN THE UNWINNABLE WAR OVER CIVIL PENALTIES: *MAINE V. DEPARTMENT OF THE NAVY*

LIEUTENANT COMMANDER MARC G. LAVERDIERE*

I. Introduction

This article examines whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] waives federal sovereign immunity for civil penalties imposed for failing to comply with state hazardous waste and substance clean up laws.2 This article reviews the CERCLA's statutory text and legislative history in light of *Maine v. Department of Navy*,[3] a recent decision from the United States Court of Appeals for the First Circuit (First Circuit Court of Appeals), which held that the CERCLA does not waive sovereign immunity for state imposed punitive civil penalties. This article also considers Congress's response to judicial decisions limiting the scope of federal waivers of sovereign immunity. Finally, this article assesses the impact of *Maine v. Department of Navy* on future state efforts to enforce federal compliance with ''mini-superfund" laws.

II. Background

Federal facilities are generating a great deal of hazardous waste,[4] allegedly ignoring toxic waste clean up laws, and saddling states with a greater environmental clean up burden.[5] Consequently, many states have responded with a campaign to compel federal compliance using, among other things, what one commentator described as "a major economic mechanism . . . to encourage federal facilities

---

*Judge Advocate General's Corps, United States Navy. Presently assigned as Environmental Counsel to the Commander, Naval Aviation Activities, Jacksonville (Navy Regional Environmental Coordinator). B.A., 1980, University of Massachusetts (Dartmouth); J.D., 1984, Suffolk University Law School; LL.M., 1994, George Washington University. This article is based on a paper that the author submitted to satisfy, in part, the requirements for the Master of Laws degree that he received from the National Law Center of George Washington University.

[1] Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1988).

[2] This paper does not address the affect of the CERCLA'scitizen suit provision—42 U.S.C. § 9659—on a state's ability to recover civil penalties from federal agencies.

[3] 973 F.2d 1007 (1st Cir. 1992).

[4] Teresa Simons, *U.S.* Military Leaving *Trail* of *Toxics*, UPI, Mar. 14, 1991, *available in* LEXIS, Nexis Library, UPI File.

[5] *Id.*

not to pollute and to clean up"—that is, civil penalties.[6] These federal facilities generally have not had to capitulate to state imposed civil penalties because of the unwillingness of many federal courts to find the requisite waivers of sovereign immunity under federal environmental laws.[7] The federal government achieved its most significant victory to date in *Department of Energy* v. *Ohio*,[8] in which the United States Supreme Court held that neither the Clean Water Act (CWA) nor the Resource Conservation and Recovery Act (RCRA) waived federal sovereign immunity for state imposed "punitive" civil penalties.[9]

The battle over state imposed civil penalties recently shifted to a new front. In *Maine* v. *Department of Navy*, a case of first impression, the First Circuit Court of Appeals held that section 120(a)(4) of the CERCLA[10] fails to waive sovereign immunity for the imposition of punitive civil penalties under Maine's hazardous waste law.[11] Maine brought suit claiming that the Navy's shipyard in Kittery, Maine, had not complied with the state's federally approved hazardous waste law.[12] The Navy eventually agreed to comply, but refused to pay civil penalties assessed by the state for past noncompliance.[13] On motion for summary judgment, the federal district

---

[6] Stan Millan, *Federal Facilities and Environmental Compliance: Toward A Solution*, 36 LOY. L. REV. 319, 340 (1991).

[7] *See, e.g.*, Sierra Club v. Lujan, 972 F.2d 312 (10th Cir. 1992) (no state imposed penalties under Clean Water Act); Mitzenfelt v. Department of the Air Force, 903 F.2d 1293 (10th Cir. 1990) (no state imposed penalties under Resource Conservation and Recovery Act); United States v. State of Washington, 872 F.2d 874 (9th Cir. 1989) (no state imposed penalties under Resource Conservation and Recovery Act); *but see* Alabama ex rel. Graddick v. Veterans Administration, 648 F. Supp. 1208 (M.D. Ala. 1986) (Clean Air Act penalties upheld).

[8] 112 S. Ct. 1627 (1992).

[9] *Id.* at 1637–38. "Punitive" penalties are imposed as punishment for violating a statutory provision, and not a court order. "Coercive" penalties are imposed to enforce an order or the process of court. *Lujan*, 972 F.2d at 314.

[10] 42 U.S.C. § 9620(a)(4) (1988). This section states as follows:

> State laws concerning removal and remediation action, including state laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a state law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

[11] Maine v. Department of Navy, 973 F.2d 1007, 1011 (1st Cir. 1992).

[12] ME. REV. STAT. ANN. tit. 38, §§ 1301–1319(k) (West 1989 & Supp. 1990) (a federally authorized hazardous waste law operating in lieu of the RCRA. *See* 42 U.S.C. § 6926 (1988). Maine imposed the civil penalties on the Navy under the state's hazardous waste law, not a state mini-Superfund law.

[13] In 1986, Maine originally brought suit in York County Superior Court seeking an order requiring the United States Navy, among other things, to comply with

court agreed with Maine that the RCRA waived sovereign immunity for fines and penalties imposed under Maine's hazardous waste law.[14] On appeal, the First Circuit Court of Appeals quickly reversed the federal district court, citing *Department of Energy v. Ohio*.[15] The circuit court then addressed Maine's new assertion that the CERCLA's waiver of sovereign immunity—that subjects federal facilities to "state laws regarding enforcement"—authorizes assessment of civil penalties.16 In rejecting Maine's contention, the circuit court pointed to the CERCLA's failure to distinguish between prospective and retrospective penalties. The absence of any clear mechanism for punishing *past* violations convinced the circuit court that section 120(a)(4) of the CERCLA does not contain an adequately clear waiver of sovereign immunity.[17]

III. Federal Supremacy and Sovereign Immunity

A. *Constitutional* Background

Under the federal supremacy doctrine, the laws of the United States made pursuant to the United States Constitution are the supreme law of the land, and "enjoy legal superiority over any conflicting provision of a state constitution or law."[18] As Chief Justice Marshall explained in *McCulloch v. Maryland*, "The government of the Union, though limited in its powers, is supreme within its sphere of action."[19]

B. *Case Law Standard*

The sovereign immunity of the United States government is founded on the supremacy clause.[20] Any waiver of sovereign immu-

---

Maine's hazardous waste law and to pay civil penalties for past violations from 1981 forward. The Navy removed the action to federal court. Eventually the Navy agreed to comply with state regulations, but refused to pay fines for past noncompliance and certain other fees assessed. See Maine v. Department of Navy, 702 F. Supp. 322, 330, 331-32 (D. Me. 1988). Following the federal district court's ruling in favor of Maine, the parties entered into a consent decree. The Navy was allowed to appeal the district court's decision, but if it lost it agreed to pay civil penalties totalling $887,200 and fees totalling $91,962. See Maine v. *Department of Navy*, 973 F.2d at 1009.

[14] *Maine* v. *Department* of Navy, 702 F. Supp. at 330.

[15] *Maine* v. *Department* of Navy, 973 F.2d at 1010.

[16] *Id.* Before the federal district court, Maine argued only that the RCRA waives federal sovereign immunity for imposition of state penalties. On appeal, Maine contended for the first time that the CERCLA waives sovereign immunity for civil penalties imposed under the state's hazardous waste law.

[17] *Id.*

[18] *See* U.S. Const. art. VI, cl. 2. *See also* BLACK'S LAW DICTIONARY 1292 (6th ed. 1979).

[19] 17 U.S. (1 Wheat.) 316, 405 (1819).

[20] Hancock v. Train, 426 U.S. 167, 178 (1976).

nity must, according to the Supreme Court, be "clear and unambiguous" in its statutory context.[21] Courts applying this standard have generated various rules for interpreting waivers of sovereign immunity, which were summarized recently in *Sierra Club* v. *Lujan*[22] as follows:

> The United States, as sovereign, is immune from suit in the absence of its consent. *Library of Congress* v. *Shaw*, 478 U.S. 310, 315, . . . (1986). "[A] waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed'" by Congress. United *States* v. *Tetsan*, 424 U.S.392, 399, . . . (1976) (quoting *United States v. King*, 395 U.S. 1, . . . (1969)); *See Mitzenfelt* v. *Department of Air Force*, 903 F.2d 1293, 1294–95 (10th Cir. 1990). A court must strictly construe a waiver in favor of the sovereign and may not extend it beyond what the language requires. *Ruckelshaus V. Sierra Club*, 463 U.S. 680, 686, . . .(1983).[23]

These rules have been applied strictly when states have sought to impose penalties that would impact the public fisc.[24]

IV. Statutory Construction

A. The CERCLA Generally

Congress enacted the CERCLA in 1980[25] to remedy the inadequacies of "partly redundant, partly inadequate federal hazardous substances clean up and compensation laws."[26] To that end, the CERCLA provides generally for removal of hazardous substances and remediation by the government or responsible parties of sites at which these substances are found;[27] inclusion of the "Superfund" to pay for clean up of contaminated sites;[28] and authority for courts to

---

[21] **Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 210 (1976);** *Hancock*, **426** U.S. **at 179.**

[22] **Sierra Club v. Lujan, 972 F.2d 312 (10th Cir. 1992).**

[23] *Id.* **at 314 (citations omitted).**

[24] *See* **Department of Energy v. Ohio, 112 S. Ct. 1627, 1640 (1992);** *see also* **Richard E. Lotz,** *Federal Facility Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity* **for** *"Requirements" and Fines and Penalties,* **31 A.F. L. REV. 7, 8 (1989).**

[25] *See supra* **note 1.**

[26] **New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1986) (quoting F. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984).**

[27] **42** U.S.C. **§ 9604 (1988).**

[28] *Id.* **§ 9611.**

hold responsible parties liable for clean up costs and natural resource damages.[29]

B. States and Federal Facilities

Like many environmental statutes, the CERCLA does not preempt states from establishing additional liability or requirements regarding the release and clean up of hazardous substances.[30] Many states have enacted hazardous clean up—or mini-superfund—laws to deal with contaminated sites within their borders.[31]

Although states were free to enact their own hazardous substance clean up laws, federal facilities remained immune to the states' requirements until the enactment of the Superfund Amendments and Reauthorization Act (SARA) of 1986.[32] The SARA added section 120 to the CERCLA, which mandates federal compliance with CERCLA provisions.[33]

More importantly, 42 U.S.C. § 120(a)(4) strictly prescribes the obligation of federal facilities to comply with state law, providing as follows:

> State laws concerning removal and remedial action, including state laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a state law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facili-

---

[29] *Id.* § 9607.

[30] *Id.* § 9614(a).

[31] Lloyd W. Landreth & Kevin M. Ward, *Natural Resource Recovery Under State Law Compared with Federal Laws,* 20 Envtl. L. Rep. (Envtl. L. Inst.) 10134,10137–8 (1990).

[32] Pub. L. No. 99–499, 100 Stat. 1613 (1986).

[33] 42 U.S.C. § 9620(a)(1) (1986). This section retained most of the CERCLA's original requirement that federal facilities "shall be subject to, and comply with [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." The CERCLA's original waiver of sovereign immunity read in its entirety: "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the federal government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section." *Id.* § 9607(g) (1982). *See also* Chesapeake and Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., 1993 U.S. Dist. Lexis 1642 (United States sovereign immunity waived by 42 U.S.C. 9620(a)(1) for attorney's fees in claim under CERCLA).

> ties which are not owned and operated by any such department, agency, or instrumentality.[34]

At least one commentator has suggested that this language "arguably waives immunity" for state imposed civil penalties.[35] Further examination leads to the conclusion, however, that this observation is not entirely consistent with the current state of jurisprudence.

C. Statutory Language

Because statutory analysis properly begins with the plain language of the statute, a review of the specific language of 42 U.S.C. § 120(a)(4) is necessary.[36]

1. State Laws *Concerning Removal and Remedial Action.*– According to 42 U.S.C. § 120(a)(4), any federal facility that is not on the Environmental Protection Agency's (EPA) National Priorities List (NPL),[37] is subject to state laws "concerning removal and remedial action, including state laws regarding enforcement."[38] This language limits the category of state laws to which the federal government is exposed under the CERCLA's waiver of sovereign immunity. The First Circuit Court of Appeals, in *Maine v. Department of Navy*, did not address specifically whether Maine's hazardous waste laws "concern[ed] removal and remedial action." However, the litigants in *Maine v. Department of Navy* considered this issue important, and other litigants will likely raise this issue in future litigation; therefore, a review of the first part of 42 U.S.C. § 120(a)(4) is in order.

Maine's principal contention was that "the instant matter [as a whole] comprises . . . a removal and remedial action,"[39] pointing to several of its hazardous waste laws that impose remedial responsibilities. These included laws authorizing Maine's Department of Environmental Protection to: (a) issue administrative orders requir-

---

[34] 42 U.S.C. § 9620(a)(4) (1986).

[35] Adam Babich & Kent E. Hanson, *Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen Organization*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10165, 10167 n.21 (1988).

[36] Redland Soccer Club, Inc. v. Department of Army, 801 F. Supp. 1432, 1434 (M.D. Pa. 1992) (CERCLA § 120(a)(4) waives sovereign immunity for clean up of sites currently owned or operated by the United States).

[37] The EPA promulgates the National Priorities List pursuant to the CERCLA, 42 U.S.C. § 9605, and is published at 40 C.F.R. pt. 300, app. B.

[38] 42 U.S.C. § 9620(a)(4) (1986). Despite the express language of the statute, at least one court has suggested that because the NPL Serves only informational purposes, placement thereon does not foreclose the duty to comply with certain state laws concerning removal and remediation. United States v. Colorado, 990 F.2d 1565, 1580 (10th Cir.), **cert.** *denied*, 1993 WL 482819 (Jan. 24, 1993).

[39] Brief for Appellee at 48, Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992) (on file at the Environment & Natural Resources Division, United States Department of Justice, Washington, D.C.).

ing remediation[40] ; and (b) clean up discharges of hazardous waste and charge the expense to responsible parties.[41] The state's civil penalty statute,[42] at issue in *Maine v. Department of Navy*, provides for removal or remediation either by compensating the state for uncorrected environmental damage, or by eliminating the need for remediation by inducing compliance with Maine's hazardous waste laws.[43] Maine also contended that laws designed to prevent release of hazardous wastes contemplate removal and remedial actions.[44]

In response, the Navy argued that the operating standards that Maine accused the Navy of violating in the complaint were found in laws pertaining to generation, treatment, and storage of hazardous waste.[45] The Navy contended that these laws were akin to RCRA requirements and not CERCLA standards relating to "removal and remedial" action.[46] The Navy also asserted that the response authorities, to specific releases of hazardous wastes, that Maine relied on were not mentioned in the complaint and therefore were irrelevant to the analysis.[47]

Because the First Circuit Court of Appeals provides no guidance on whether Maine's civil penalty statute involved "removal or remediation" action, we must consider other court's opinions. In *Pennsylvania Department of Environmental Resources (PDER) v. United States Small Business Association (SBA)*,[48] a rare state court opinion on this issue, the PDER sought injunctive relief under the state's Solid Waste Management Act (SWMA)[49] to force compliance with the Act and to compel the SBA "to remove and clean up" hazardous substances and industrial waste that it had stored, spilled, and disposed of at its wallpaper factory in Pennsylvania.50 The SBA asserted federal sovereign immunity arguing that 42 U.S.C. § 120(a)(4) did not apply because the SWMA was not a state law concerning removal and remedial action.[51] The Pennsylvania state

---

[40] 38 ME. REV. STAT. ANN. tit. 38, §§ 1304(12), 1310 (West 1989).

[41] *Id.* § 1319-D, § 1319-G (West 1990).

[42] *Id.* § 349 (West 1989).

[43] *Id.*

[44] *Id.*

[45] Reply Brief for Appellant at 9, Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992) (on file at the Environment & Natural Resources Division, United States Department of Justice, Washington, D.C.).

[46] *Id.*

[47] *Id.* at 10.

[48] 579 A.2d 1001 (Pa. Commw. Ct. 1990).

[49] Act of July 7, 1980, Pub. L. No, 380, §§ 101-103, as amended, 35 P.S. § 6018.101-6018.1003.

[50] *Pennsylvania* Department of *Environmental Resources v.* United *States Small Business* Association, 579 A.2d at 1002.

[51] *Id.* at 1005.

court, finding that the CERCLA defines the terms "removal" and "remedial" broadly,[52] held that despite the absence of the word "cleanup" in Pennsylvania's statute, the scope of the law "clearly encompasses the cleanup of hazardous waste sites."[53] The state court reasoned that the SWMA addresses past actions as well as prospective acts, and the storage, disposal, and transportation components of the law include the concept of cleanup.[54]

In *United States* v. *Pennsylvania* Department of *Environmental* Resources *(PDER)*,[55] a federal district court in Pennsylvania addressed a similar issue. The United States claimed its right of sovereign immunity under the CERCU to prevent the PDER from exercising jurisdiction, under Pennsylvania's SWMA,[56] over a contaminated drainageway located at a federal facility in Pennsylvania. The United States argued that 42 U.S.C. § 120(a)(4) waives sovereign immunity only for "mini-CERCUS," and that because the SWMA lacked "specific, predetermined standards for cleanup of waste" it failed to qualify.[57] The federal district court rejected this argument.

---

[52] 42 U.S.C. § 9601(23) (1988) states as follows:

> The terms "remove" or "removal" mean the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate . . . the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, . . . The term includes, in addition, without being limited to, security fencing or other measures to limit access. . . .

Id. § 9601(23).

> The terms "remedy" or "remedial action" mean those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The terms include, but are not limited to, such actions at the location of the release as storage, confinement . . . cleanup of released hazardous substances or contaminated materials . . . and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. . . .

Id. § 9601(24) (1988).

[53] *Pennsylvania Department of Environmental Resources v. United States Small Business* Association, 579 A.2d at 1005; *cf.* United States v. Colorado, 990 F.2d 1565, 1580 (10th Cir.), *cert. denied,* 1993 WL 482819 (Jan. 24, 1993)(RCRA not equivalent to CERCLA removal and remedial actions, but CERCLA definition of "removal" and "remedial" may be broad enough to incorporate certain RCRA corrective actions).

[54] *Id.*

[55] 778 F. Supp. 1328 (M.D Pa. 1991).

[56] PA. STAT. ANN. tit. 35, §§ 6018.301, 6018.302, 6018.601, 6018.601 (Purdon 1991–92).

[57] *United States v. Pennsylvania Department of Environmental Resources,* 778 F. Supp. at 1328.

Relying on the "broad" definitions of "remove," "removal," and "remedial action,"[58] the district court held that a state law conferring authority to "require polluters to assess and clean up" contaminated sites is a law "concerning removal and remedial action."[59]

In light of these decisions, a compelling argument exists that the laws on which Maine relied in bringing suit against the Navy concerned removal and remedial action. Maine based one of its complaints on the Navy's failure to store and dispose of hazardous wastes properly, which includes the concept of cleanup, *i.e.*, "removal."[60] Furthermore, the action, as a whole, was in the nature of "enforcement," *i.e.*, "remediation."[61]

2. State Laws Regarding Enforcement.—The most significant question of this analysis is whether the language of section 120(a)(4) of the CERCLA-"[s]tate laws regarding enforcement"—encompasses civil penalties for past noncompliance with state hazardous waste laws.[62] The First Circuit Court of Appeals, relying on Department of Energy *v.* Ohio, held that it did not.[63]

Examining the statutory context provided the First Circuit Court of Appeals with little guidance as to whether Congress intended to waive sovereign immunity for prospective coercive fines, retrospective civil penalties, or both.[64] After minimal analysis, the circuit court, in *Maine v.* Department of Navy, resolved the ambiguity in 42 U.S.C. § 120 by adopting the Supreme Court's observation in *Department of* Energy *v.* Ohio concerning the RCRA's waiver of sovereign immunity: "The absence of any example of punitive fines is powerful evidence that Congress did not intend to subject the United States to an enforcement mechanism that could deplete the federal fisc."[65] However, the circuit court's reliance on this language may have been misplaced.

In Department of Energy *v.* Ohio, the Supreme Court considered, among other things, whether the RCRA's waiver of sovereign

---

[58] *Id.* at 1331. The terms remove, removal, remedy, and remedial action include enforcement activities related thereto. 42 U.S.C. § 9601(25) (1988).

[59] *United States v. Pennsylvania Department of Environmental Resources,* 778 F. Supp. at 1328.

[60] Pennsylvania Department of Environmental Resources v. United States Small Business Association, 579 A.2d 1001, 1005 (Pa. Commw. Ct. 1990).

[61] *United States v. Pennsylvania Department of Environmental Resources,* 778 F. Supp. at 1331.

[62] 42 U.S.C. § 9620(a)(4).

[63] Maine v. Department of Navy, 973 F.2d 1007, 1011 (1st Cir. 1992) (the parties submitted written briefs to the First Circuit Court of Appeals prior to the Supreme Court's deciding *Department of Energy v. Ohio).*

[64] *Id.* at 1011.

[65] *Id.*

immunity failed to expose federal facilities to punitive, civil penalties.[66] The RCRA's federal facility provision provides, in part, that the federal government is subject to "all . . . state . . . requirements . . . including any . . . provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief. . . . [T]he United States . . . shall [not] be immune from any process or sanction of any . . . Court with respect to the enforcement of any such injunctive relief."[67] The Supreme Court interpreted this language as including only the coercive—not the punitive—means for implementing substantive standards.[68] The Supreme Court reasoned that the omission of any reference to punitive fines in the RCRA is in "stark contrast" to the clear references to enforcement mechanisms for ensuring compliance in the future.[69]

Conversely, 42 U.S.C. § 120(a)(4) contains none of the qualifying language found in the RCRA limiting its waiver to coercive penalties. Nevertheless, the First Circuit Court of Appeals' holding in *Maine v. Department of Navy* arguably is good law. Several cases that interpret the federal facility provision of the CWA, including *Department of Energy v. Ohio,* are sufficiently analogous to offer support to the holding in *Maine v. Department of Navy*.

In *McClellon Ecological Seepage Situation v. Weinberger*,[70] the Federal District Court for the Eastern District of California held that the CWA does not clearly and unequivocally waive sovereign immunity for state imposed civil penalties for past violations of state law. The district court specifically concerned itself with that part of section 313 of the CWA that reads: "The United States shall be liable only for those civil penalties arising under federal law or imposed by a state or local court to enforce an order or the process of court."[71] In reaching its decision, the district court observed that "the learned members of Congress, some of whom are learned members of various bars, can say waiver of sovereign immunity for civil penalties just as easy as any eighth grader [but]. . . [t]hey have not done that. Instead they have inserted conjunctive and disjunctive references that bring about absurd and contradictory results."[72]

In *Department of Energy v. Ohio,* the Supreme Court, besides ruling on the RCRA's waiver of sovereign immunity, held that the CWA's waiver lacked sufficient clarity to expose federal facilities to

---

[66] Department of Energy v. Ohio, 112 S. Ct. 1627, 1640 (1992).

[67] 42 U.S.C. § 6961 (1988).

[68] *Department of Energy v. Ohio,* 112 S. Ct. at 1640.

[69] *Id.*

[70] 655 F. Supp. 601 (E.D.Cal. 1986).

[71] 33 U.S.C. § 1323(a) (1988).

[72] *McClellon,* 655 F. Supp. at 604.

punitive, civil penalties.[73] The Court addressed two parts of section 313 of the CWA. The first part[74] contained the term "sanction," which is defined as a "mechanism of enforcement."[75] Consequently, "sanction" encompasses fines and penalties.[76] The Court was unable to discern congressional intent, however, in part because the term "sanction" is "spacious enough to cover" punitive as well as coercive fines.[77] The context within which "sanction" was found only served to support the Court's conclusion.[78]

The second pertinent part of section 313 provides that "the United States shall be liable only for those civil penalties arising under federal law or imposed by a state or local court to enforce an order or the process of court."[79] The Court found that the statute's language—"to enforce an order or the process of court"—waived sovereign immunity for *coercive* fines.[80] The Court was less certain over the meaning of "civil penalties arising under federal law." Although this language "may indeed include" punitive, civil penalties, the Court concluded that any tension in a provision purporting to waive sovereign immunity "is resolved by the requirement that any statement of waiver be unequivocal."[81]

The CERCLA's waiver, exposing the United States to "state laws regarding enforcement," falls victim to the same constraint. The key to unlocking the waiver in section 120(a)(4) of the CERCLA is the word "enforcement." *Black's Law* ***Dictionary*** defines "enforcement," in part, as "the execution of a law . . . the carrying out of a . . . command."[82] The root word of enforcement is to "enforce," which is defined, in part, as "to make effective; as to enforce a particular law, a writ, a judgment, or . . . the collection of a . . . fine; to compel obedience to."[83]

Use of the term "enforcement" within the context of environ-

---

[73] *Department of Energy v. Ohio*, 112 S. Ct. at 1639.

[74] 33 U.S.C. § 1323(a) provides in relevant part that "the federal government shall be subject to, and comply with, all federal, state, . . . requirements . . . and process and sanctions . . . . The preceding sentence shall apply . . . (C) to any process and sanction, whether enforced in . . . courts or in any manner. . . ."

[75] *Department of Energy v. Ohio*, 112 S. Ct. at 1636 (quoting BLACK'S LAW DICTIONARY 1341 (6th ed. 1990)).

[76] *Id.* at 1636.

[77] *Id.*

[78] *Id.* at 1637.

[79] 33 U.S.C. § 1323(a) (1988).

[80] *Department of Energy v. Ohio*, 112 S. Ct. at 1638; *accord* Sierra Club v. Lujan, 972 F.2d 312, 314 (10th Cir. 1992).

[81] *Department of Energy v. Ohio*, 112 S. Ct. at 1638.

[82] BLACK'S LAW DICTIONARY 528 (6th ed. 1990).

[83] *Id.*

mental compliance also exists. In *Meyer* v. *United States Coast Guard*,[84] the Federal District Court for the Eastern District of North Carolina considered whether state imposed civil penalties were "requirements" to which the Coast Guard was subject under the RCRA. In holding that they were not, the district court observed that civil penalties are "a means by which requirements are *enforced* and not requirements themselves."[85]

In short, the word "enforcement," like the word "sanctions," is expansive enough to cover punitive as well as coercive civil penalties.[86] When legislators compose waivers of sovereign immunity with expansive terms or phraseology without clarification, courts—like the First Circuit Court of Appeals—are likely to find no necessary implication that Congress intended to waive sovereign immunity for the punitive as opposed to the coercive fine.

3. Requirements.—Section 120(a)(4) exposes federal facilities to state "requirements" that are not "more stringent" than those applied to facilities not owned by the federal government.[87] The term "requirements" has been interpreted to require federal compliance with objective state standards of control,[88] that are subject to uniform application.89

In *Parola v. Weinberger*,[90] the Court of Appeals for the Ninth Circuit examined the scope of the term "requirements." The circuit court held that a "requirement" under the RCRA included a city ordinance which obliged the Naval Postgraduate School to honor the city of Monterey's grant of an exclusive garbage collection franchise. The circuit court observed that

> The history of the federal compliance controversy instructs us that the meaning of "requirements" cannot, as in Hancock . . . and EPA v. *California* . . . be limited to substantive environmental standards—effluent and emission levels, and the like—but must also include the procedural means by which those standards are implemented: including permit requirements, reporting and monitoring duties, and submission to state inspections.[91]

---

84 644 F. Supp. 221 (E.D.N.C. 1986).

85 *Id.* at 222 (emphasis added); *see* United States v. Washington, 872 F.2d 874, 880 (9th Cir. 1989); *see also* California v. Walters, 751 F.2d 977 (9th Cir. 1984) (criminal penalties are enforcement mechanisms, not requirements).

86 *Department of Energy v. Ohio*, 112 S. Ct. at 1636.

87 *See* 42 U.S.C. § 9620(a)(4).

88 United States v. Hancock, 426 U.S. 167, 188–89 (1976).

89 Kelly v. United States, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985).

90 848 F.2d 956 (9th Cir. 1988).

91 *Id.* at 961 (emphasis added).

Despite its broad scope, however, the term "requirements" does not extend to "punitive measures" such as civil penalties.[92]

V. Legislative History

When statutes are unclear on their face regarding waivers of sovereign immunity, federal courts have turned to the legislative histories.[93] The Supreme Court recently pronounced, however, that reference to legislative history is inappropriate when construing a waiver of sovereign immunity.[94] "If clarity does not exist [in the statutory context], it cannot be supplied by a committee report."[95] Nevertheless, because the future impact of this principle of not referring to legislative history in construing a waiver of sovereign immunity is unclear, and because the court did not apply it in *Maine v. Department of Navy*, a review of the CERCLA's legislative history is necessary.

In support of an expansive reading of 42 U.S.C. § 120(a)(4), Maine pointed to various comments made by legislators just prior to the SARA's enactment. For example, Senator Stafford explained that the SARA "does not diminish the application of state law nor does it preempt state law in any way for federal facilities not listed on the NPL."[96] The Conference Committee Report explained that "[t]his clarifies that CERCLA, together with RCRA, requires federal facilities to comply with all federal, state, and local requirements, procedural, and substantive, *including fees and penalties*, except as provided in section 121."[97]

These comments are not particularly helpful in divining congressional intent. As the First Circuit Court of Appeals concluded, they do not describe how the "CERCLA might differ from RCRA on [punitive, civil penalties]," nor do they provide insight as to how this case can be distinguished from *Department of Energy v. Ohio*.[98]

---

[92] *Department of Energy v. Ohio*, 112 S. Ct. at 1640; Mitzenfelt v. Department of the Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990); United States v. State of Washington, 872 F.2d 874, 880 (9th Cir. 1989); Meyer v. United States Coast Guard, 644 F. Supp. 221, 222 (E.D.N.C. 1986).

[93] *See, e.g.*, *Washington*, 872 F.2d at 878; *see also* McClellon Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 604 (E.D. Cal. 1986).

[94] United States v. Nordic Village Inc., 112 S. Ct. 1011, 1013–14 (1992).

[95] *Id.* at 1014.

[96] 132 CONG. REC. 28,413 (1986).

[97] JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, S. CONF. REP. 962, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3335.

[98] Maine v. Department of the Navy, 973 F.2d 1007, 1011 (1st Cir. 1992).

The extent of 42 U.S.C. § 120(a)(4) also was discussed on the senate floor four years after its passage. Tying 42 U.S.C. § 120 directly to the pending litigation in *Maine v.* Department of *Navy*, Senator Mitchell commented that sovereign immunity was "broadly waived," and subjected federal facilities to "all state . . . sanctions, including penalties."[99] However, this comment, like those discussed by the First Circuit Court of Appeals, is unclear as to punitive, civil penalties. In any event, this comment should carry little weight in revealing the intent of the Congress that enacted the legislation, because the Senator expressed the comment after the SARA's enactment.[100]

VI. Congressional Intervention

Dissatisfied when courts narrowly construe waivers of sovereign immunity, Congress legislatively overrules them. In *Hancock v. Train*,[101] the Supreme Court held that federal facilities were required to comply with objective state air standards, but were not compelled to obtain state permits because section 118 of the CAA[102] did not require compliance with "all" state requirements.103In *EPA* v. *California ex rel. State Water Resources* Control *Board*,[104] the Supreme Court reached a similar result under section 313 of the CWA,[105] holding that federal agencies were not subject to state National Pollution Discharge Elimination System permit requirements.[106] Congress reacted by amending the CAA and the CWA to include "all" state requirements, "procedural and substantive."[107]

In the wake of the Supreme Court's decision in Department *of Energy* v. *Ohio,* Congress enacted the Federal Facility Compliance Act (FFCA) of 1992.[108] Its major purpose is to waive sovereign immu-

---

[99] H.R. REP. No. 141, 101st Cong., 1st Sess. 6–39 (1989).

[100] "The views of later Congresses are of little value in ascertaining the intent of the Congress which passed the legislation." Mitzenfelt v. Department of the Air Force, 903 F.2d 1293, 1295 n.1 (10th Cir. 1990) (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117–18(1980)).

[101] 426 U.S. 167 (1976).

[102] Clean Air Act, 42 U.S.C. § 1857(f) (1976).

[103] *Hancock*, 426 U.S. at 182.

[104] 426 U.S. 200 (1976).

[105] Clean Water Act, 42 U.S.C. § 1323(1970 Supp. IV).

[106] *EPA v. California ex rel. State Water* Resources Control *Board*, 426 U.S. at 226.

[107] Clean Air Act, 42 U.S.C. § 7418, *amended* by Pub. L. 95–95 (1977); Clean Water Act, 33 U.S.C. § 1323(a), *amended* by Pub. L. 95–217 (1977).

[108] Pub. L. No. 102–386, § 102, 106 Stat. 1505(1992).

nity for civil and administrative penalties under the RCRA, effectively overruling the Supreme Court's holding. Section 6001 of the RCRA, as amended by the FFCA, subjects the federal government to "all penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature."[109] Consequently, federal facilities no longer are immune from civil penalties imposed for failure to comply with state hazardous waste laws.

Nevertheless, the First Circuit Court of Appeals's decision in *Maine* v. *Department of Navy* continues to loom as an obstacle for states seeking to impose civil penalties on federal agencies for failure to comply with state mini-superfund laws. Some states have mini-Superfund laws[110] that are *distinct* from federally authorized state hazardous waste laws operating in lieu of the RCRA.[111] If a federal facility should violate a state's mini-Superfund law, the state may have to rely on the CERCLA's waiver to impose civil penalties on that federal facility.[112] Citing the holding in *Maine v. Department of Navy*, federal facilities are sure to oppose any such effort.

If the holding in *Maine v. Department of Navy* becomes the guidepost for resolving future debate over 42 U.S.C. § 120(a)(4), federal courts will foreclose the use of civil penalties to compel federal compliance with state mini-Superfund laws. Congress is unwilling, however, to accept narrow judicial interpretations of federal waivers of sovereign immunity under environmental statutes.[113] If history offers any insight into future actions,[114] we can expect Congress to eliminate any ambiguity in the statutory text of section 120(a)(4).

---

[109] 42 U.S.C. § 6961(a), *amended* by Pub. L. No. 102-386, § 102, 106 Stat. 1505 (1992).

[110] *See, e.g.*, MONT. CODE ANN. § 75, ch. 10, pts. 701-15 (1992); Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. Cons. Stat. §§ 6020.101-6020.1305.

[111] *See* 42 U.S.C. § 6926 (1988).

[112] States may try to rely on the RCRA's waiver of sovereign immunity, as amended by the FFCA. States contending that the RCRA's corrective action provisions are broad enough to encompass removal and remedial actions, taken pursuant to those states' mini-superfund laws, may not succeed. *Cf.* United States v. Colorado, 990 F.2d 1565 (10th Cir.), *cert.* denied, 1993 WL 482819 (Jan. 24, 1993) (CERCLA expressly preserves state RCRA authority which is not the "equivalent to laws concerning removal and remedial actions"). The better approach may be for states to invoke the RCRA's waiver by initiating corrective action under their hazardous waste law operating in lieu of the RCRA, provided it covers the type of corrective action needed.

[113] *See* supra notes 103-04.

[114] *See* H.R. 340, 103d Cong., 1st Sess. (1994), presently pending before Congress, known as the Federal Facilities Clean Water Compliance Act of 1993. Modeled on the FFCA of 1992, the Act will, if enacted, clarify that under the CWA federal agencies are subject to "state . . . sanctions . . . includ[ing] all civil and administrative penalties . . . punitive or coercive in nature."

VII. Conclusion

In *Maine v. Department of Navy* the First Circuit Court of Appeals addressed whether section 120(a)(4) of the CERCLA contains a clear and unambiguous waiver of federal sovereign immunity for state imposed punitive, civil penalties.[115] Although expansive enough to include civil penalties, 42 U.S.C. § 120(a)(4) fails to distinguish between the coercive and punitive nature of these penalties. Congress therefore failed to legislate an unequivocal waiver of sovereign immunity.[116]

Increasingly, when federal courts narrowly construe federal waivers of sovereign immunity, Congress overrules the courts through legislative enactments. In passing the FFCA,[117] Congress demonstrated that it knows how to waive sovereign immunity for punitive, civil penalties when it intends to do so.[118] If *Maine v. Department of Navy* is the first step toward denying states the use of civil penalties against the United States for past violations of state hazardous substance clean up laws, Congress again could intervene. Writing "with a clear . . . [and] unequivocal hand,"[119] Congress can amend the CERCLA and thus resolve 42 U.S.C. § 120(a)(4)'s ambiguity. As a result, federal agencies may win the judicial battles over civil penalties, but still lose the war.

---

[115] Maine v. Department of Navy, 973 F.2d 1007, 1009 (1st Cir. 1992).

[116] *Id.* at 1011.

[117] *See* Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, $102, 106 Stat. 1505 (1992).

[118] *Cf.* United States v. State of Washington, 872 F.2d 874, 877 (9th Cir. 1989) (quoting Parola v. Weinberger, 848 F.2d 956, 962 n.3 (9th Cir. 1988) (only unequivocal reference to sovereign immunity in the RCRA, 42 U.S.C. § 6961 (1988), is aimed "at court-ordered sanctions for a violation of an injunction").

[119] McClellon Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 605 (E.D. Cal. 1986).

BOOK REVIEWS

A HISTORY OF WARFARE*

REVIEWED BY MAJOR FRED L. BORCH**

John Keegan's many years as a military historian give him a breadth of knowledge matched by few. His earlier books, among them *The Face of Battle*, *The Mask of Command*, and *Six Armies in Normandy*, are well known and reflect solid scholarship. However, his latest effort, *A History of Warfare*, is a disappointment. *A History of Warfare* does a fine job in tracing the evolution of war from the distant past to the present. The book ultimately fails as good military history, however, because of Keegan's flawed view of Prussian General Karl von Clausewitz and his influence on modern western warfare. Keegan insists that warfighters in the West are addicted to Clausewitzian "total war" concepts, and that Clausewitz is "the ideological father" of the ever more destructive path that war in the West has taken. Because this Clausewitzian path may lead to the West's own destruction, western military thinker's must "denounce" the false "ideology" Clausewitz. Otherwise, Keegan warns, western civilization "shall not survive." This intellectual crusade against Clausewitz and his influence is the major theme of *A History of Warfare*. The crusade fails, however, because Keegan's discussion of Clausewitz is inaccurate and incomplete, if not simply wrong. Consequently, the major theme of *A History of Warfare* is flawed. The result is an erroneous picture of the theoretical foundations of western warfighting today. Consequently, judge advocates looking for a balanced, comprehensive analysis of the western method of war will not find it in this book.

Most of *A History of Warfare* is given to an interesting and, at times, lively discussion of the nature of war over the millennia. Keegan describes the ritualistic combat of early man, and explores war as fought by the ancient Greeks and Romans, Easter Islanders, Mongols, Samurai, and Zulus. In examining everything from barbarian tribesmen to atomic weaponry, Keegan's breadth of knowledge is impressive. Military lawyers will find Keegan's discussion of early attitudes toward new weapons most interesting. Just as the law of war today wrestles with the legality of laser and particle beam weap-

---

*JOHN KEEGAN, A HISTORY OF WARFARE (New York: Alfred A. Knopf, Inc., 1993); 432 pages; $27.60 (hardcover).

**Judge Advocate General's Corps, United States Army. Currently assigned as a Student, United States Army Command and General Staff College, Fort Leavenworth, Kansas.

onry, the sixteenth century faced the "lawfulness" of crossbows and handguns. Keegan explains:

> Armed with a crossbow a man might, without any of the long apprenticeship to arms necessary to make a knight, and equally without the moral effort required of a pike-wielding footman, kill either of them from a distance without putting himself in danger. What was true of the crossbowman was even more true of the handgunner; the way he fought seemed equally cowardly, and noisy and dirty as well, while requiring no muscular effort whatsoever.

It is no wonder that early crossbowmen were executed when taken prisoner—"their weapon was a cowardly one and their behavior treacherous." Passages like this one in ***A History*** of ***Waflare*** are both educational and entertaining.

Had Keegan focused on the history of war when writing ***A History*** of ***Waflare,*** the book would be of value to the reader. He persists, however, in examining war's place in modern civilization, and perhaps more importantly, what Keegan believes is its ***future*** role in the West. War in the West, he argues, has evolved to the point that it "may well be ceasing to commend itself to human beings as a desirable or productive, let alone rational, means of reconciling their discontents." ***This*** means that war "truly has become a scourge." In sum, unlimited war of the kind now practiced in the West brings only increased human suffering, and virtually no benefit. But a study of war through the ages, according to Keegan, proves that war need not be a part of human society. Consequently, the West can—and must—stop the destructive total war it wages today. Keegan maintains that Clausewitz and his theories must be rejected, because they are the cause of this western way of war. Western thinkers must recognize that war is not a continuation of politics, so that the West's culture can change to have a "potentially peaceful future."

Given John Keegan's rather virulent criticism of Clausewitz, closely examining this Prussian general and his theory of war is worthwhile. Such an examination reveals why Keegan thinks ill of him. It also shows, however, why Keegan simply is wrong about Clausewitz and Clausewitzian theory. Finally, this careful scrutiny of Clausewitz explains why this review concludes that ***A History*** of ***Warfare*** distorts the theoretical underpinnings of war in the West.

Although Clausewitz's famous On ***War*** contains thousands of words, the book is known chiefly for its dictum that war is the continuation of politics "by other means." Clausewitz's linkage of war with politics grew from his own observations of eighteenth century European society. He saw Napoleon's actions and the conflict

unleashed by the French Revolution as inextricably connected to political forces. In the context of Clausewitz's own time, and modern European history, war certainly was a continuation of politics.

However, Clausewitzian theory is about far more than this political outlook on war. Additionally, what Clausewitz has to say about other aspects of war does not depend on the validity of his opinion that war is an extension of politics.

The hallmark of Clausewitzian theory is its insistence that war is "unpredictable, ambiguous and intuitive rather than clear, precise and manageable." Warfighting does have rational elements. Clausewitz's conclusion, however, that war fundamentally is dominated by the *irrational* sets him apart from all others who have written about war. Clausewitz believed that war cannot be reduced to a neat set of principles or rules. He believed, however, that its complexity could be understood by a "military genius"—that although war cannot be taught like science or mathematics, it can be understood by some. In short, men and women will always exist who can bring victory out of the chaos on the battlefield. "Friction" and the "fog of war" mean chaos on the battlefield, but a study of past wars, experience, training, and "military genius" point the way to success.

The opening line of A *History* of *Warfare* is: "War is not the continuation of policy by other means." Keegan's point is clear—he rejects Clausewitz's famous pronouncement. Instead, Keegan insists "that war embraces much more than politics: that it is always an expression of culture, often a determinant of cultural forms, in some societies the culture itself." Consequently, Keegan concludes that Clausewitz's view of the nature of war is "incomplete, parochial and ultimately misleading,"

Keegan's insistence that war is far more than an extension of politics makes sense. Wars can be apolitical, reflecting instead a society's culture. The horse people of the steppes, for example, did not wage war as an extension of political activity. Clausewitz failed to see this aspect of war, as he believed "in the primacy of politics rather than culture." Consequently, a number of historical exceptions to Clausewitz's conclusion that a "political motive" was the "precipitating and controlling factor in warmaking" exist. Keegan insists, however, that Clausewitz's view not only is incorrect, but is potentially disastrous as well. If politics and war are inextricably linked, nation states will continue to go to war to solve interstate disputes. The end result, Keegan writes, is "total war," as the nation state that can militarize the greatest portion of its population and resources is more likely to win a war. It follows that the "ideology" of Clausewitz has resulted in the "total war" or "unlimited war"

waged by the West today. Keegan even blames Clausewitz for influencing thermonuclear war. After all, he says, the doctrine of "mutual assured destruction" is war waged through the politics of deterrence.

Is this true? Is Clausewitz the darling of war planners and commanders? Is On ***War*** the bible for the West's warriors? Must Clausewitzian theory be rejected for the West to survive? Although Keegan insists that the answer to these questions is "yes," he is quite wrong. First, as previously discussed, Clausewitz's theory of war goes far beyond the "war is politics" dictum. To reject Clausewitz because one aspect of his theory does not apply to nonwestern culture is foolish. Second, Clausewitz's position that a multitude of variables make war irrational and chaotic is verified by human experience. That A History of ***Waflare*** never touches on these aspects of Clausewitz'stheory of war is intellectually dishonest. It also suggests that Keegan has never read all of On War, much less studied it or Clausewitz.

Finally, Keegan greatly exaggerates the influence that Clausewitz—or any theorist—has had on western warfare. The United States Army's 1986 and 1993 ***Field Manuals (FM) 100-5***, ***Doctrine,*** for example, do pay tribute to Clausewitz when demanding that commanders reflect agility, versatility, and initiative in planning and fighting wars. The very existence, however, of ***FM 100-5*** and the many other field manuals published over the last twenty-five years illustrate that the United States Army believes that certain principles of war can be deduced. This is because the military, "often intolerant of ambiguity and complexity," prefers a neat set of rules or guideposts for both garrison and field. When Keegan argues that western warfighters are addicted to Clausewitzian theory, he clearly is incorrect. Clausewitz says rules cannot guide warfare, yet the very existence of field manuals runs counter to Clausewitzian theory. This is not to say that Clausewitz gets "lip service" only. On ***War*** remains an important book for the military professional. However, Keegan vastly overrates his influence. More importantly, other than a passing reference to Von Moltke (who claimed the application of Clausewitz's principles led to the German victory over the Austrians in 1871), A History of ***Waflare*** provides not one shred of evidence that western military thought is dominated by Clausewitz today. On the contrary, it seems likely that few officers read Clausewitz—and even fewer study his work. In any event, as Keegan calls on the West to denounce Clausewitz, his book should have provided at least some credible evidence in support of this position.

A note on Keegan's style. It can be distracting. In making a point or in explaining a concept, he often digresses to the point of rambling. In a chapter entitled "Armies," for example, he writes

that "an intellectual is a person who discovers there is something more interesting than sex." A quote that may bring a smile to a face, but does not advance a discussion of military history. A *History of Warfare* is full of similar passages.

The dustjacket of A *History of Warfare* claims that the book is "a masterpiece, destined to become a classic work." A number of reviewers have made similar pronouncements. Unfortunately, nothing could be more inaccurate. Keegan's incomplete treatment of Clausewitz results in an inadequate and fundamentally flawed treatment of western warfare. There can be no quarrel with Keegan's idea that peace is "good" and war is "bad," but his use of Clausewitz as the "bad boy" is inaccurate, incomplete, and ultimately misleading. Consequently, A *History of Warfare* is of limited value.

THE PRICE OF VICTORY*

REVIEWED BY LIEUTENANT COLONEL SAMUEL J. ROB**

Military lawyers will find Vincent Green's first novel, The *Price of Victory,* engrossing. The story of a young defense counsel's struggle against the military justice system and his own doubts about his client, while relying heavily on stereotypes, is guaranteed to pique the interest of those who "have been there"—if for no other reason than to critique how closely the fictional trial mirrors one's own experiences. That the novel is loosely based on an actual court-martial will only add interest to the story and leave the reader wondering what is fact and what is fiction.

Vincent Green is a former member of the Army's Judge Advocate General's Corps who left the Army after five years and subsequently studied writing with John Casey, a National Book Award winner. Mr. Green received a Masters of Fine Arts as a Henry Hoyns Fellow at the University of Virginia in 1988 and now lives and writes in South Dakota.

During his military career, then Captain Green served as a trial defense counsel in Germany in the early 1980s and enjoyed a reputation as a bright and skillful trial attorney. Among his many cases, he

---

*VINCENT S. GREEN, THE PRICE OF VICTORY (New York: Walker and Company, 1992); 219 pages; $19.96 (hardcover).

** Judge Advocate General's Corps, United States Army. Currently assigned as Team Chief, Contract Appeals Division, United States Army, Ballston, Virginia.

represented a senior noncommissioned officer who was charged with participating in a drug ring, led by a young lieutenant, that smuggled drugs across the Dutch border. This reviewer's premise is that this trial served as the basis for *The Price of Victory.*

The actual trial involved a drug ring, comprised of soldiers stationed in Karlsruhe, Germany, who planned to attack and seize weapons from an arms room at an Air Defense Artillery site in Landau, Germany, then use the captured weapons to rob the finance center at Grafenwoehr, Germany. Before their plan could be brought to fruition, United States Army Criminal Investigation Division (CID) agents, acting on a tip from one of the conspirators—who was dissatisfied with his share of the drug profits—apprehended most of the gang members on their return from a drug run to Holland. The lieutenant was tried and convicted and sentenced to confinement for thirty years.[1] The remaining gang members, except Captain Green's client, were convicted pursuant to guilty pleas.[2] Captain Green's client was not present at the time of the drug arrest and only was identified as a coconspirator through the statements of his alleged accomplices who testified against him in exchange for reductions in sentences.

Anyone intending to read *The Price of Victory* should first read the case of *United States v. Curry*.[3] The United States Army Court of Military Review's (ACMR) opinion provides an excellent synopsis of the facts of the case and provides an interesting backdrop for the novel. Older Army judge advocates especially will find themselves trying to surmise which characters in the book are purely fictional and which characters, although fictional, may have been loosely based on actual persons.

The novel evolves around the court-martial of Sergeant First Class Billy Frazier, a former Green Beret who saw combat in Grenada and Panama, and his defense counsel, Captain Jack Hayes. Captain Hayes is a young, idealistic attorney who, in the course of the book, becomes increasingly frustrated with the court-martial system and his own growing doubts about his client. The remaining cast consists of the usual stereotypes: a chain of command bent on conviction; an aggressive, borderline unethical trial counsel; a crusty old pro-

---

[1] The lieutenant's sentence subsequently was reduced by the Secretary of the Army to 17 years.

[2] The reviewer, assigned as a new defense counsel in Karlsruhe, Germany at the time, represented one of the coconspirators. My client was scheduled for reassignment to the United States two weeks after his arrest. It was my client's best friend that contacted the Criminal Investigation Division after learning from my client that his share of the drug profits was less than the others.

[3] 15 M.J. 701 (A.C.M.R. 1983), *rev'd in part, aff'd in part,* 18 M.J. 103 (C.M.A. 1984).

government judge whose courtroom demeanor and harsh sentences earned him the nickname "The Whopper"; and a young wife who is becoming increasingly distant from Captain Hayes because of his obsession with the case. To contribute to his problems, if one could call this a problem, Captain Hayes's father-in-law is the head of a high-powered law firm and his wife is pressuring him to leave the Army and make "big money.''

Without revealing the plot, suffice it to say that the book has it all—sex, drugs, deceit, marital strife, and even murder. The book is a ''made-for-television movie" in hardback. Depending on whether a reader desires entertainment or education, such comment is either praise or condemnation. Above all, the author does a good job of building suspense. Readers undoubtedly will find themselves trying to predict the verdict as the courtroom drama unfolds.

The author obviously knows his subject. His description of military life, his use of military acronyms, and his presentation of the workings of the court-martial system are accurate, though presented in such a way as to not lose an uninitiated reader. Unfortunately, in an attempt to appeal to a wider audience, the author relies too heavily on stereotypes. While such a ploy may make for more interesting reading, it serves to perpetuate, rather than dispel, the negative image that many civilians hold of military justice. Conversely, the author hardly can be faulted for making reader interest—as opposed to improving the image of military justice—his lodestar. Moreover, it will be the rare judge advocate who, on completion of the book, will not claim to have encountered, in some form, one or more of the characters in the course of his or her career.

The reader who accepts the book for what it is—a work of fiction—will enjoy it. The person who reads *The* Price of *Victory* with a critical eye and is defensive about the image of military justice that the book projects will be less satisfied.

SARAJEVO: A WAR JOURNAL*

REVIEWED BY H. WAYNE ELLIOTT**

While writing this review, United States fighter jets have shot down four Bosnian Serb jet aircraft over Bosnia-Herzegovina. A fragile truce holds in Sarajevo as Bosnian Moslems have formed a tentative alliance—brokered by the United States—with Croats. What pushed the West to finally act may well be the death of sixty-eight residents of besieged Sarajevo, killed by a single shell fired by Serbian mortars in the hills above the city. The war in Bosnia has taken another turn down a twisted path with no discernible destination. What will be the effect of these latest developments? Will the demonstration of western military might finally force the parties to some sort of real negotiation or simply make them even more intransigent? Will the new alliance compel the Serbs to admit the futility of diplomatically taking on the rest of the world? Time will tell.

The conflict in Bosnia has raged for two years. Sarajevo: A War *Journal* provides a glimpse of part of the conflict, the siege of the city of Sarajevo. Zlatko Dizdarevic provides a first-hand account of "life" at the other end of the sniper's rifle or the artillery's shells. Dizdarevic is the editor of the last daily newspaper published in Sarajevo. The paper's name—*Oslobodenji*—means "liberation" in Serbo-Croatian.

Television has brought this war to our living rooms. Some credit the images of wounded children lying in crowded and unhygienic hospitals with having spurred the United States and its European allies, if not the entire United Nations (UN), to get involved in what often is presented as a civil war. Through television we see the death and destruction taking place in Sarajevo. Through this book we get a feeling for the terror created by the siege.

As every military lawyer realizes, civil wars raise significant legal issues. Dizdarevic (a graduate of the Sarajevo Law School) dismisses the idea that this conflict is a civil war, although he recognizes that it has some of the characteristics of a civil war. In the first few pages he makes clear his opinion that this is a war of aggression. The aggressor is Serbia. Allied with Serbia are radical Serbs within Bos-

---

* ZLATKO DIZDAREVIC, SARAJEVO: A WAR JOURNAL (Fromm International); 193 pages; $19.95 (hardcover).

** Lieutenant Colonel, United States Army (Ret.). Former Chief, International Law Division, The Judge Advocate General's School, United States Army. Presently an SJD candidate, University of Virginia Law School.

nia. This is a well-armed force. Its weapons and equipment come from the former Yugoslav Army.

What is the fighting about? In Dizdarevic's opinion the war is the result of the collapse of the old Yugoslav government and the attempt by those who ran it to remain in power. The prime villain here is Slobodan Milosevic, formerly an orthodox Communist, now the leader of Serbia. When he came to power the states of Slovenia, Croatia, and Bosnia-Herzegovina declared their independence. Milosevic refused to accept their independence and armed the Serbs inside Bosnia. The war aim is the creation of a "Greater Serbia." The Bosnian Serbs are led by Radovan Karadzic, described by Dizdarevic as "a fascist compared to whom any former SS man is an epic hero from a children's story."

Rather than the institutionalized religious and ethnic hatred depicted by some in the American media, Dizdarevic writes of a Sarajevo in which the people peacefully practiced three major religions (Serbian Orthodox, Catholicism, and Islam) and lived and worked alongside people of different backgrounds (either Bosnian Moslems, Croats, and Serbs). All spoke the same language. Forty percent of the marriages in Sarajevo were "mixed." Moslems married Serbs or Croats. (Dizdarevic, a Moslem, is married to the daughter of a mixed marriage of a Serb and a Croat.) All that changed in April **1992** with the outbreak of war.

This book is not an exhaustive treatment of the causes of the war or the legal nature of the conflict. It is, however, an account of the citizenry's increasingly primitive existence inside a city besieged, where even the most rudimentary daily tasks can result in death. The book provides moving accounts of the people's efforts to maintain their lifestyles despite having no public transportation, little food, sporadic electricity, and a reduced water supply. The currency is worthless—business is conducted using German Marks or through barter.

The book is a series of fifty-four columns, each two or three pages long, which appeared in *Oslobodenji* between April **1992** and August **1993.** It gives the reader a feel for the hardships of life in a besieged city. As the enemy takes the high ground around the city it becomes clear that its inhabitants will be terrorized by the Serb guns. No one is safe. Everything is in short supply. Newsprint to publish the paper is almost nonexistent. Yet the staff continues to print a paper. To stop would be to give in to the terrorists. Instead, the building in which the paper is published becomes a priority target of the Serbs.

The author is especially critical of the UN Protection Force

(called the "un-Protection Force" in the book). After initial relief that the Blue Helmets were deploying to Sarajevo, the people have lost faith in them. For the people of Sarajevo, they come "to symbolize international hypocrisy and political dirty dealing." In Dizdarevic's view, the force is at best ineffective and, at worst, corrupt. The rigid rules and conditions placed on the UN force and its mandated neutrality stand in the way of any sense of justice for the people of Sarajevo. This neutrality results in the punishment of the victims of the aggression. Dizdarevic asks, "How can the victims be equated with the aggressors?"

The military lawyer would be well advised to read this book. One of the recurring problems facing the judge advocate charged with teaching the law of war is developing enough current examples to illustrate the utility of the law. In this book are many examples of violations of the law. The participants in this conflict target vehicles marked with the Red Cross, destroy public buildings with no military significance, take hostages, deport people, and kill children. To come up with a military reason for each incident presented is difficult. In the language of operational law, no military necessity exists.

Even if no one is prosecuted for these crimes, the Serbs will pay a heavy price for their actions. It will be some time before the international community welcomes a group that takes its international law obligations so cavalierly. It will be a longer time before the people of Sarajevo will forget. As the siege continues, and the violations of the law of war mount, the reader senses the increasing hostility of the people of Sarajevo. As Dizdarevic writes, "No one can go on living with the memory of it without a desire for revenge."

This is not an objective account. The author is quite biased. But who can blame him? His life, and that of the others in Sarajevo, is constantly at risk. An historic and cosmopolitan city (the site of the 1984 Olympics) is reduced to rubble. Western commentators seem to equate all parties as somehow equally guilty. Who speaks for the war's victims? One person is Zlatko Dizdarevic.

The United Nations has established an international tribunal at the Hague to hear war crimes cases from the former Yugoslavia. This book makes the need for such trials quite apparent. Snipers indiscriminately select targets. From a distance one cannot tell whether the victim is a Moslem, a Croat, or a Serb. Of course, that sort of target discrimination is probably too much to expect from an "army" that shoots three-year-old children.

An elementary principle of military operations is that an understanding of the situation is crucial to planning an operation. "bo often, the situation in Bosnia is presented as one in which a peaceful

resolution is possible only through the creation of three ethnic "homelands." This book should dispel that idea. The author stresses that before the war the people of Bosnia lived in harmony in a multiethnic society. Removal of the leaders of the fanatical Serbs might permit a return to those times.

Whether as peacemakers or peacekeepers, a military force must understand the depth of feeling among those who live in the area. This book presents the case against the Serbs and if only half is true, defending them will be difficult.

The last page of the book describes Sarajevo as a city "reduced to the status of a zoo" and one of which the world seems to relish its "plight with a degree of sadism." One of the reasons often cited for the law of war is that compliance with it makes a return to peace more likely. The corollary is that noncompliance makes a return to peace more difficult. As one reads this book it becomes clear that the inhabitants of once peaceful Sarajevo may not be so forgiving. A lasting peace may be some distance away. Even if it comes, the animals in the zoo are not likely to forget who put them there.

THE ANATOMY OF THE NUREMBERG TRIALS*

REVIEWED BY MAJOR FRED L. BORCH**

Why was it necessary to establish an International Military Tribunal (IMT) at the end of World War II? Who were the central figures responsible for its creation? How successful were the initial prosecutions? In The Anatomy of the *Nuremberg Trials*, author Telford Taylor answers these questions and more. Those looking for detached historical scholarship, however, will not find it in this book. Rather, this is a "personal memoir." Taylor writes about Nuremberg as he "saw, heard, and otherwise sensed it at the time." He recounts not only the trials themselves, but what went on *outside* the courtroom, too. He also examines why Nuremberg remains a "benchmark in international law."

*TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (New York: Alfred A. Knopf, Inc., 1993); 703 pages; hardcover.

**Judge Advocate General's Corps, United States Army. Currently assigned as a Student, United States Army Command and General Staff College, Fort Leavenworth, Kansas.

Taylor, a distinguished lawyer and law professor, explains that originally much opposition existed to an IMT for war crimes. Both the British and the Soviets, for example, favored "summary execution" for major war criminals. Given Stalin's suggestion at Teheran in 1943 that "50,000 German General Staff officers should be liquidated," the Soviet view is not surprising. As late as April 12, 1945, however, the British War Cabinet also concluded that "for the principal Nazi leaders a full trial under judicial procedure was out of the question." Winston Churchill and the British instead proposed that these Nazis simply be shot.

President Roosevelt and his advisors believed that Nazi atrocities against religious and racial groups, and the German initiation and waging of "aggressive" war, were illegal under international criminal law. Judicial proceedings would be "good policy for the future peace of the world." Moreover, an international trial might establish "a precedent for punishing crimes against peace in the future." A number of small trials in France, Germany, Great Britain, or the Soviet Union would carry little weight. Conversely, one major trial would focus world attention on the role of law in war, and underscore the emerging world view that "warfare was legitimate only in defense against an aggressive attack." In sum, an international trial of the major war criminals would highlight the American view that future international society must be ordered by law.

When President Truman made it clear that he opposed summary executions, the British position turned around. The British, writes Taylor, now saw that "[s]ummary execution looked like a simple way out of troublesome problems but it was out of tune with the times." Additionally, no way existed to draw a "principled line" between those Nazis who would be put on trial and those who simply would be shot. The IMT was a good solution. Furthermore, the French supported the idea of war crimes trials as well.

Although the Soviets eventually agreed to an international tribunal, they adopted the view that the guilt of the defendants was settled. Consequently, they felt that the tribunal need meet only to fix the appropriate sentences. The Soviet view, however, did not prevail. Supreme Court Justice Robert H. Jackson, the American chief prosecutor, made it clear that the IMT would sit to determine guilt or innocence before passing sentence. As the Americans "had the bulk of the documentary evidence," and eighteen of the twenty-two most important defendants at the first Nuremberg trial were in either American or British hands, the Soviets really had little choice; their refusal to participate would not have prevented war crimes trials at Nuremberg.

After examining the genesis of the IMT, *The Anatomy of the*

Nuremberg *Trials* details the trials of individual defendants like Goering, Hess, Keitel, Jodl, and Speer. Thylor also explores the reasons behind the criminal prosecution of the German High Command, the SS, and Gestapo. For example, the Allied consensus was that membership in certain organizations like the SS "should be taken as prima facie evidence of guilt." The horrors of the concentration camps, and events like the killing of American prisoners of war at Malmedy, were viewed as proof that the SS had an inherently criminal purpose, and that all of its members merited punishment. Because the Waffen-SS had some thirty-five divisions and more than 500,000 members at the end of World War 11, individual trials would have taken years. It follows that attaching criminal responsibility to individuals based on voluntary membership in an organization was seen as the only ***practical*** way to deal with a multitude of war crimes. Taylor admits, however, that such "organizational guilt" flies in the face of generally accepted Anglo-American principles of law, and a number of commentators have criticized the Nuremberg prosecutions of "criminal" organizations.

Thylor identifies Justice Jackson as the principal figure responsible for shaping the Nuremberg trials, and he believes Jackson's role was "unique and vital." The "core and focus of the Nuremberg enterprise was, from the beginning to the end, the American prosecution." Jackson's energies were the driving force behind this prosecution. However, Taylor does not hesitate to criticize Justice Jackson and the other Nuremberg participants for their shortcomings, particularly in the area of litigation skills.

Judge advocates will find Taylor's recollections about the interplay between the American, British, French, and Soviet participants most interesting. The criminal procedure adopted by the IMT necessarily blended Anglo-American "adversarial" concepts with Continental "inquisitorial" practice as there was a considerable gulf to bridge. The Soviets, for example, had never heard of "cross examination," and did not appreciate its role in a criminal-defense. Taylor's discussion of these nuts-and-bolts problems shows that organizing and running the IMT was not an easy task.

Although Taylor emphasizes that ***The Anatomy*** of ***the*** *Nuremberg* ***Trials*** is a memoir rather than a meticulously researched history, he does include "source notes" and a bibliography. He also has footnotes. These footnotes, however, are unnumbered. Thylor should have grouped these source notes and footnotes together, and numbered them. The lack of organization in this area is both unhelpful and annoying. However, this is a minor criticism. Overall, judge advocates with an interest in international and criminal law will enjoy reading *The* Anatomy of ***the*** *Nuremberg* ***Trials.***

U.S. Postal Service

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

Required by 39 U.S.C. 3685)

1A. Title of Publication	1B. PUBLICATION NO.	2. Date of Filing
Military Law Review	0 0 2 6 4 0 4 0	31 Jan. 1994
3. Frequency of Issue	3A. No. of Issues Published Annually	3B. Annual Subscription Price
Quarterly	Four	Dom. $12.00 For. $15.00

4. Complete Mailing Address of Known Office of Publication *(Street, City, County, State and ZIP+4 Code) (Not printers)*

The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

5. Complete Mailing Address of the Headquarters of General Business Offices of the Publisher *(Not printer)*

Department of the Army, Washington, D.C. 20310

6. Full Names and Complete Mailing Address of Publisher, Editor, and Managing Editor *(This item MUST NOT be blank)*

Publisher *(Name and Complete Mailing Address)*

Colonel John T. Edwards, Commandant
The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

Editor *(Name and Complete Mailing Address)*

Captain Stuart W. Risch, Senior Legal Editor
The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

Managing Editor *(Name and Complete Mailing Address)*

Captain Stuart W. Risch, Senior Legal Editor
The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781

7. Owner *(If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given. If the publication is published by a nonprofit organization, its name and address must be stated.) (Item must be completed.)*

Full Name	Complete Mailing Address
Headquarters, Department of the Army	Washington, D.C. 20310-2200

8. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities *(If there are none, so state)*

Full Name	Complete Mailing Address
None	

9. For Completion by Nonprofit Organizations Authorized To Mail at Special Rates *(DMM Section 423.12 only)*
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes *(Check one)*

(1) ☒ Has Not Changed During Preceding 12 Months
(2) ☐ Has Changed During Preceding 12 Months

(If changed, publisher must submit explanation of change with this statement.)

10. Extent and Nature of Circulation *(See instructions on reverse side)*	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
A. Total No. Copies *(Net Press Run)*	8200	8193
B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales		
2. Mail Subscription *(Paid and/or requested)*	1063	1063
C. Total Paid and/or Requested Circulation *(Sum of 10B1 and 10B2)*	1063	1063
D. Free Distribution by Mail, Carrier or Other Means Samples, Complimentary, and Other Free Copies	7000	7010
E. Total Distribution *(Sum of C and D)*	8063	8073
F. Copies Not Distributed 1. Office use, left over, unaccounted, spoiled after printing	137	120
2. Return from News Agents		
G. TOTAL *(Sum of E, F1 and 2—should equal net press run shown in A)*	8200	8193

11. I certify that the statements made by me above are correct and complete

Signature and Title of Editor, Publisher, Business Manager, or Owner

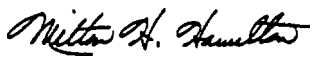
STUART W. RISCH, CAPTAIN, U.S. ARMY, EDITOR

PS Form 3526, Dec. 1987 *(See instructions on reverse)*

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
06048

U.S. GOVERNMENT PRINTING OFFICE: 1993-300-757:80002